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THE CASE OF  
REQUISITION

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# THE CASE OF REQUISITION

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*In re* a PETITION OF RIGHT of  
DE KEYSER'S ROYAL HOTEL LIMITED  
DE KEYSER'S  
ROYAL HOTEL LIMITED

*v.*

THE KING

---

By LESLIE SCOTT

Of the Inner Temple, formerly Exhibitioner of New College, one of His Majesty's Counsel, and Member of Parliament for the Exchange Division of Liverpool

And ALFRED HILDESLEY

Of the Inner Temple, Barrister-at-Law, formerly Scholar of Pembroke College

---

With an Introduction

By the Right Honourable SIR JOHN SIMON

Of the Inner Temple, Fellow of All Souls College, one of His Majesty's Counsel  
and sometime Attorney-General to His Majesty

---

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## INTRODUCTION

LEADING cases in Constitutional Law are chiefly concerned with establishing the rights of individual citizens in the face of exceptional interference by the Executive, and a heavy crop of judicial decisions on this subject might, at first sight, have been expected in the years 1914-19. But in fact the instances in which such questions were raised and decided by English Courts are few. It is instructive to observe the reason for their scarcity; certainly the explanation is not to be found in the slightness or infrequency of official interference with private rights within these islands during those anxious years.

The Great War necessarily involved such action in an unprecedented degree. But public opinion and the House of Commons generally recognized as inevitable the claim of the Authorities to interfere drastically in the interests of national defence with individual rights, and the conduct of the Crown's advisers was not regarded as opposed to the interests of citizens but rather as representing the claims of the whole body politic against some individual member.

In the seventeenth century, on the contrary, constitutional rights were fought for in the Law Courts and insisted upon in Parliamentary debate because the Crown on the one side was felt to be opposed to Parliament and people on the other. The jealousy and suspicion of Executive interference which were thus engendered profoundly affected

the course of constitutional practice in times of crisis thereafter. Claims by the Crown to disregard private rights on the plea of the needs of national defence were jealously scrutinized. Even in a year of disaster like 1757 the authority of Parliament was invoked to provide (and, be it noted, to pay for) lands urgently needed for the fortification of Portsmouth, Chatham, and Plymouth. The powers of taking lands which Pitt exercised to protect the realm against the danger of Napoleon's projected invasion were based upon express Parliamentary sanction. But in the century which followed Waterloo there was little occasion to analyse the extent of the powers which the Crown might employ without Parliamentary authority in disregard of private rights for the purpose of national defence; and when in August 1914 the emergency arose the Government could count with confidence on general acquiescence in the steps it felt bound to take on behalf of a united people.

Moreover, Parliament in the early days of the war rushed through a piece of emergency legislation which authorized the Executive, without further reference to the Legislature, to make and enforce regulations 'for securing the public safety and the defence of the realm'.<sup>1</sup> The original regulations

<sup>1</sup> The original Defence of the Realm Bill was introduced on Friday, August 7, 1914, and was passed through all its stages at that sitting of the Commons without discussion. As no printed copies were available (for Bills are not officially printed for the use of Members till they have been read a first time) the Home Secretary read the terms of the Bill to the House (*Parl. Debates*, vol. lxxv, col. 2192), and announced a special Saturday sitting next day when the Royal Assent might be given to the Bill after it had passed the Lords. The limited scope of this first



were few in number and were addressed to obvious risks of danger to national safety arising from the conditions of such a war. But these Regulations multiplied so fast and soon touched upon so great a variety of topics that lawyers as well as laymen found it almost impossible to ascertain whether official claims, alleged to be based on one or other of these Regulations, were legally justified. It was not until the actual fighting was over, though the operation of many of these Regulations continued, that a challenge as to their scope and validity began to be commonly heard.

In the meantime administrative convenience and patriotic acquiescence combined to encourage the belief that prerogative powers in time of war were practically without limit. The correction which the Law Courts could have applied was not sought, so that the few cases on this subject which have recently come up for judicial decision have a special value and importance because they have helped to re-establish the true constitutional view. Amongst these cases, the litigation which the authors of this volume have called 'The Case of Requisition' may fairly claim to be the chief. In the course of that case the official contention that the Crown could acquire compulsorily the use of a subject's land for the purposes of national defence without incurring any obligation to pay for it was shown to be without

enactment was indicated by the Minister's remark that summary Courts might be needed for 'cases of tapping wires or attempts to blow up bridges'. Yet it was from this modest beginning that there developed, during the next four years, under the unprecedented conditions of war, the portly volume of nearly four hundred pages known as the 'Consolidated Defence of the Realm Regulations'. *Parturiunt mures, nascetur terribilis mons.*

historical or legal foundation, and the House of Lords by a unanimous judgment laid it down that while public necessity may justify expropriation it cannot destroy the subject's right to be paid for the land so taken.

The actual question raised in the litigation which is the subject of this book was simple enough. The War Office, desiring to house the Head-quarters Staff of the Royal Flying Corps, decided that a well-known hotel building on the Thames Embankment was suitable for the purpose and took possession of it from the owners. In thus acting, the War Office was following a course which had repeatedly been taken during the war by Government departments in London and elsewhere. The duration of such occupation by the Crown was indefinite and would depend upon the exigences of the Public Service, of which the department would be the sole judge. The department were willing that payment should be made out of public funds for the use of the hotel as a matter of grace, and proposed to refer the matter of the amount to be paid to a Commission which had been set up to advise the Crown what payments should 'in reason and fairness' be made in respect of direct and substantial loss incurred through the exercise of the Crown's rights and duties under the Defence of the Realm, *in cases where the subject had no other remedy*. But the Crown denied that the Hotel Company had any 'right' to compensation.

The Hotel Company insisted that it had, and the question was therefore precisely raised whether when the Crown requisitions property in time of war for the Defence of the Realm there arises any legal obligation to pay for the property thus requisitioned.

The Suppliants in launching their Petition of Right were faced with the difficulty that this question appeared to have been already answered in favour of the Crown's contention in a previous decision. This was the Shoreham Aerodrome Case,<sup>1</sup> in which the Court of Appeal had unanimously affirmed the view expressed by Mr. Justice Avory that the Crown, both by virtue of the Royal Prerogative and under the Defence of the Realm Regulations, was entitled to take possession of and occupy land and premises for the purposes of the defence of the realm without making any compensation therefor. It seemed fairly clear that this decision would apply to the question raised in connexion with the requisition of De Keyser's Hotel, but advocates faced with a decision which is opposed to their contention struggle to find a ground of distinction and are sometimes assisted in these refinements by a sympathetic Judge. The Shoreham Aerodrome case, like the De Keyser Hotel case, was concerned with the requisition of real property for purposes connected with the Air Services of the Crown, but it was suggested that there might be a distinction between the compulsory taking of land to accommodate a fighting unit on the coast, and the requisition of a building in the Metropolis for the purpose of housing an administrative body. Mr. Justice Peterson, before whom the De Keyser Hotel case first came, having come to the conclusion that the occupation of the hotel was necessary for the purpose of securing the public safety and the defence of the realm, considered the question of law which he had

<sup>1</sup> *In re a Petition of Right* [1915] 3 K.B., 649.

to decide as answered for him by the Court of Appeal in the Shoreham Aerodrome case: 'Therefore,' he said in his judgment, 'it is not my opinion which I am expressing when I come to the conclusion that the present Petition must be dismissed. Whatever may be the ultimate decision on the rights of subjects as against the Crown in cases of this description, for the present purpose I must recognize that I am bound by the decision of the Court of Appeal and accordingly I must dismiss the Petition.'

The Suppliants thereupon appealed to the Court of Appeal and endeavoured to distinguish the present case from its predecessor by urging that the Shoreham Aerodrome case was analogous to an entry upon land by the sea coast to dig trenches, and was not analogous to the taking of lands or buildings for purely administrative purposes. The attempt thus to distinguish the two cases gained in piquancy from the circumstance that one of the Lords Justices had also been a party to the earlier decision. When the judgment came to be given the Master of the Rolls insisted upon the suggested distinction and said of the Shoreham Aerodrome case:<sup>1</sup> 'Whether rightly decided or not—and it is of course still open to review in the House of Lords—it has no application to such a case as the present, namely, taking possession of land and buildings for administrative purposes.' Lord Justice Warrington also found it possible to draw the required distinction, and thus the Suppliants succeeded in obtaining the support of the majority in the Court of Appeal and the Crown became Appellants in the House of Lords. It is amusing to note that in the supreme

<sup>1</sup> (1919) 2 Ch., 229.

tribunal (where the previous decision of the Court of Appeal in the Shoreham case could not control the issue) the attempt to find distinctions which advocates and judges had been driven to draw in the Courts below, did not find much favour. 'I am bound to say', observed Lord Dunedin,<sup>1</sup> 'that I do not think that this case can be distinguished from that in essential particulars. The existence of a state of war is common to both. As to the necessity for the taking over of the particular subject, the Crown Authorities must be the judge of that, and the evidence as to the necessity for the occupation of these premises in the opinion of the Crown's advisers is just as distinct and uncontradicted in this case as it was in that. I confess that had I been sitting in the Court of Appeal I should have held the same view as was expressed by Peterson, J.,—namely, that it was ruled by the case of *In re a Petition of Right*.'

Here then is a pretty illustration of the working of precedents in English Case Law! The majority of the Court of Appeal and all the Judges in the House of Lords arrived at the same conclusion—but by different means. In the Court of Appeal where the earlier decision mattered, the Court reached the correct result by drawing a distinction between the two cases; in the House of Lords where the earlier decision created no obstacle, the distinction was declared not to exist, the earlier decision was overruled, and the Court of Appeal's later view was approved.

But it may be safely asserted that the real reason for the view taken by the Court of Appeal is to

<sup>1</sup> App. A, p. 171.

be found in the historical researches which had taken place since the Shoreham case, and in the light which these threw upon an obscure and almost forgotten corner of constitutional law. The Suppliants were the first to institute a search and they presented such material as they had to the Court of Appeal in the course of their argument. The Master of the Rolls thereupon decided that the hearing should be adjourned in order that a more complete examination of the records might be made with the resources which the Crown had at hand. The conclusion was a remarkable one: ‘The result of the searches which have been made’, said the late Lord Swinfen,<sup>1</sup> ‘is that it does not appear that the Crown has ever taken the subject’s land for the defence of the realm without paying for it; and even in Stuart times I can trace no claim by the Crown to such a prerogative.’ Lord Justice Warrington similarly observed, in reference to the many ancient records which were brought to the notice of the Court of Appeal,<sup>2</sup> ‘There is no trace in any of them of an assertion on the part of the Crown of a right to take and hold possession of the subject’s land without paying for it’. Lord Dunedin, in his speech in the House of Lords, analysed the effect of the records as follows:<sup>3</sup> ‘There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. On the other hand, there is no mention of a claim made in respect of land taken under the Prerogative for the acquisition of which there was neither bargain nor statutory sanction. Nor is

<sup>1</sup> (1919) 2 Ch., 221.

<sup>2</sup> (1919) 2 Ch., 232.

<sup>3</sup> App. A, p. 171.

there any proof that any such acquisition had taken place.' The decision in the Shoreham case was given before this investigation of ancient records had been made and it is useful both for historians and for lawyers to observe how greatly the historical inquiry assisted the conclusion ultimately reached as a matter of law.

The analogy to this instance of history coming in to correct the first impressions of some lawyers is to be found in the famous case of *Ship-Money*,<sup>1</sup> and in the course of the argument for the Suppliants in the Court of Appeal it was thought not unseemly to remind the Lords Justices, who were troubled by the Shoreham decision, of the parallel. Sir George Crooke was one of the Justices of the Court of King's Bench who upheld the side of Hampden, but he was also one of the Judges who previous to Mr. St. John's two-days' argument in that trial—'the finest argument that had ever been heard in Westminster Hall' as Lord Campbell reminds us—had signed an opinion for the King asserting the legality of ship-money. Sir George Crooke in his judgment explains that he signed the Opinion because it was the view of the majority of the Judges though he did not himself share it,—thus acting in the same way as a dissenting member of the Judicial Committee would act to-day when reporting to the Crown the advice of the supreme Imperial tribunal. But Mr. Justice Crooke was not content to justify his apparent change of view by drawing a distinction between his advisory and his judicial functions, for he is at pains to add: 'And if I had been of that opinion absolutely, now having heard all the

<sup>1</sup> 3 How. St. Tr. 825.

arguments on both sides, and the reasons of the King's Counsel to maintain this writ, and why the Defendant is to be charged; and the argument of the Defendant's counsel against the writ, and their reasons why the Defendant should not be charged to pay the money assessed him, and having duly considered the records and precedents showed unto me, especially those of the King's side, I am now of an absolute opinion that this writ is illegal, and declare my opinion to be contrary to that which is subscribed by us all. And if I had been of the same opinion that was subscribed, yet upon better advisement being absolutely settled in my judgment and conscience in a contrary opinion, I think it no shame to declare that I do retract that opinion, for *humanum est errare*, rather than to argue against my own conscience, and therefore none having, as I conceive, removed those difficulties, I shall proceed to my argument, and show the reasons of my opinion, and leave the same to my lords and brothers. Not one precedent nor record in any precedent time, that hath been produced or showed unto me, that doth maintain any writ, to lay such a charge upon any county, inland or maritime.'

This curious extract from the 3rd volume of the *State Trials*<sup>1</sup> is from a judgment pronounced in 1637. But the judgment in the Case of Requisition 283 years later teaches the same lesson,—the lesson that the foundations of constitutional law lie deeply embedded in ground which is in the joint occupation of historians and lawyers, and that the protection of private citizens against unfounded claims by the Executive is one of the most valuable functions of the judiciary.

JOHN SIMON.

<sup>1</sup> p. 1146.



## CHAPTER I

### THE HISTORY OF THE CASE

THE following statement of the facts is taken from the judgement of Lord Dunedin<sup>1</sup>:

‘In April 1916 the Army Council finding it necessary to have accommodation in London for the head-quarters personnel of the Royal Flying Corps and for the design section of the same, communicated with the Board of Works with a view to their finding a suitable building. That Department, which had previously had some tentative offers from the Receiver and Manager in possession of the premises belonging to the De Keyser Hotel Company, Limited, came to the conclusion that the building known as De Keyser’s Hotel would suit. They communicated with the War Office to that effect on the 18th April 1916, and on the same date applied to the Receiver to see on what terms he would let. After a short period of ineffectual negotiation, the Board of Works, on the 29th April, informed the Receiver that “after full consideration of the matter the Board are of the opinion that it will be to the advantage of all concerned to refer the question of the amount to be paid by the Government for the use of such of the hotel premises as will be required to the Defence of the Realm Losses Commission. In these circumstances the Board have no option but to communicate with the War Office with a view to the hotel premises, excluding the shops, being requisitioned under the Defence of the Realm Acts in the usual manner.” Following on this communication the War Office,

<sup>1</sup> See App. A, p. 168.

on the 1st May, wrote as follows to the Receiver : " De Keyser's Royal Hotel, E.C. I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations, excluding the shops, the other portions sub-let, and the wine cellars. . . . I enclose forms of claim for submission to the Defence of the Realm Losses Commission. Compensation, as you are probably aware, is made *ex gratia* and is strictly limited on the actual monetary loss sustained." On receipt of this letter the Receiver expressed his willingness to facilitate the taking possession, but at the same time he safeguarded his position by the following letter on May 3rd : " I write to inform you that I have instructed Messrs. John Barker & Son, Limited, to represent me at the making of the inventory of the contents of this hotel, and also to meet your representative there to-morrow and to render every facility in order that the necessary work may be done with the utmost expedition. I desire, however, to inform you that the steps that I am taking are without prejudice to the question as to whether the Army Council are within their rights in acquiring possession of the above property under their notice dated 1st May 1916, as to which I am being advised." This was followed up by a letter of 5th May to the following effect : " Referring to the letter of the 1st instant from Captain Cole of the Lands Branch, War Office, it does not seem to me that the acquisition of this building as offices is necessary for the purpose of securing the public safety or the Defence of the Realm, or that such an acquisition is within the powers conferred by the Defence of the Realm Consolidation Regulations, 1914. I must, therefore, enter a protest against the notice contained in the letter if acted upon, and you must understand that anything which I am doing in the matter is without prejudice to the rights of all parties interested in

the hotel. I think that a fair rent might be fixed by a personal negotiation between the representative of the authority acquiring the building and myself, but failing this I would ask you to agree to submit the question to arbitration." To this the Office of Works replied on the 9th May: "With regard to your letter of the 5th instant, the premises having been commandeered by the Military Authorities under the Defence of the Realm Acts, the amount of payment to the Applicants out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with the applicants' property or business through the exercise of the Crown of its rights and duties in Defence of the Realm will be determined by the Defence of the Realm Losses Commission. Having regard, therefore, to paragraph 4 of your letter it would seem advisable for a claim to be made on a form prepared for the purpose, a supply of which I believe, you have, as soon as possible." As no settlement was arrived at and the Receiver declined to go before the Losses Commission there was presented a Petition of Right by the De Keyser Company.'

The prayer of the Petition claimed :

(1) A declaration that your Suppliants are entitled to payment of an annual rent so long as your Majesty's Principal Secretary of State for the War Department of Your Majesty's Army Council or any other person or persons acting on your Majesty's behalf continues in use and occupation of the said premises.

(2) The sum of £13,520 11s. 1d. for use and occupation of your Suppliants' said premises by your Suppliants' permission from the 8th day of May 1916 to the 14th day of February 1917.

(3) In the alternative an inquiry as to what is a fair rent of the said premises and payment of the sum to be found.

(4) A declaration that your Suppliants are entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.

(5) Further a declaration that your Suppliants are entitled compensation pursuant to the Defence Act 1842 for such other losses and injurious consequences as aforesaid.

(6) Such other declaration as to your Suppliants' rights in the premises as Your Majesty's High Court of Justice may deem right and proper.

By his Answer and Plea His Majesty's Attorney-General raised the following contentions :

(4) On or about the 29th April 1916, in consequence of the state of war then and still existing between His Majesty and certain Foreign Powers, it became necessary for the purpose of securing the public safety and the defence of the Realm that possession of the Suppliants' land and premises known as the De Keyser's Royal Hotel should be taken by the Competent Military Authority on behalf of and for the use of His Majesty.

(5) By reason of the aforesaid necessity possession was on or about the 1st May 1916 taken of the said lands and premises by and under the authority of the Competent Military Authority on behalf of and for the use of His Majesty. Such possession was properly and lawfully taken by virtue of His Majesty's Royal Prerogative as well as by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the Regulations issued thereunder by His Majesty in Council.

(6) The Attorney-General further gives the Court to understand and be informed that His Majesty has acquired from the Suppliants no right in or over the said lands and premises, and that beyond the right to take and use the same for so long as may be necessary for the purpose of securing the public safety and the Defence of the Realm during the continuance of a state of war between His

Majesty and any Foreign Power His Majesty claims as against the Suppliants no right or interest in the said lands and premises.

(7) No rent or compensation is by law payable to the Suppliants in respect of the matters aforesaid or any of them either under the Defence Act, 1842 or at all. The Suppliants have been offered on behalf of His Majesty payment of such sum as in the opinion on the Defence of the Realm Losses Commission ought in reason and fairness to be paid to them out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown aforesaid of its rights and duties in the Defence of the Realm.'

The Petition was heard before Mr. Justice Peterson on March 20, 21, and 22, 1918. A considerable body of evidence, both oral and documentary, was adduced for the purpose of establishing that the Suppliants had voluntarily allowed the officers of the Crown to occupy the hotel in circumstances from which an agreement to pay rent for the occupation of premises arose by implication. This question of fact was decided by Mr. Justice Peterson in favour of the Crown,<sup>1</sup> the learned judge being of opinion that it was impossible to come to the conclusion that possession was voluntarily delivered, or that the Crown was using and occupying the hotel with the Suppliants' permission. Having regard to what was said in *In re a Petition of Right*<sup>2</sup> and in *The*

<sup>1</sup> *De Keyser's Royal Hotel, Ltd., v. The King*, 34 T.L.R. 329.

<sup>2</sup> (1915) 3 K.B. 649. Reported under this title for the reason that it was inexpedient at the time to refer to the property and locality (an aerodrome at Shoreham in Sussex) which was the subject of the litigation. The Shoreham case was fully argued

*Zamora*<sup>1</sup> he felt bound to come to the conclusion that the occupation was necessary for securing the public safety and the defence of the Realm. While expressing no opinion upon the questions of law argued in *In re a Petition of Right*<sup>2</sup> (which were not argued before him), the learned Judge held himself bound by the decision of the Court of Appeal in that Case and gave judgment for the Crown.<sup>3</sup>

The arguments in the Court of Appeal were mainly directed in the first instance to a detailed examination of the legislation relating to the taking of land for purposes of defence, which culminated in the Defence Act, 1842.<sup>4</sup> Another line of historical investigation was, however, developed as the argument proceeded. In preparing themselves to argue the Case the Suppliants had commenced to make investigations at the Record Office into the practice

in the House of Lords but no judgment was given, the Attorney-General (Sir Frederick Smith) stating on the fourth day of hearing that there were grounds in the special circumstances of the case for treating the matter as being one which in the original contemplation of the parties was to be dealt with under the Defence Act, 1842. The Appeal was accordingly withdrawn, the Crown consenting to pay compensation as provided by the Defence Act, 1842, and the acts amending the same, to be settled by arbitration—(1916) W. N. 311. The decision of the Court of Appeal was therefore regarded as binding. For the effect upon this decision of the judgment in the Case, see p. 69, *post*.

<sup>1</sup> (1916) 2 A. C. 77.

<sup>2</sup> (1915) 3 K. B. 649.

<sup>3</sup> The counsel appearing were: For the Suppliants, Mr. P. O. Lawrence, K.C., Mr. Leslie Scott, K.C., M.P., and Mr. W. Copping; for the Crown, the Attorney-General (Sir Frederick Smith, K.C., M.P.), the Solicitor-General (Sir Gordon Hewart, K.C., M.P.), Mr. Austen-Cartmell, Mr. Lowenthal, and Mr. Givcen (for Mr. Branson).

<sup>4</sup> 5 & 6 Vict., c. 94. For the amending statutes, see p. 10, *post*, note (1).

which had prevailed in former wars with regard to the occupation of land for the purposes of defence. Having regard to the wealth of material which is available these inquiries were necessarily incomplete, but the Suppliants were in a position, by reference to documents which had been transcribed from the public records, to state that no instance had been found in which the Crown had claimed, as a matter of right, to take and occupy the land of the subject free from an obligation to make compensation.

The evidence produced was of such a character as to satisfy the Court that further inquiry ought to be made. The argument on appeal, which had occupied the 18th, 19th, 22nd, and 23rd of July, 1918 was therefore adjourned by direction of the Master of the Rolls, in order that a more complete search might be undertaken by the Crown. On October 22, 1918, the matter was mentioned to the Court by the Attorney-General who suggested a further adjournment on account of the complexity and number of the documents which required examination. On December 3, 1918 Mr. Austen-Cartmell informed the Court that, while the search might proceed indefinitely, the time had come when it would be right to say that no advantage would be gained by continuing the investigation, it being reasonable to anticipate that nothing more would be found beyond what was *in pari materia* with what had already been discovered. The Court assenting to this view, a selection of typical documents was made by Junior Counsel for the parties and included in an Appendix of Documents printed for use in the Court of Appeal and in the argument of the Case in the House of Lords.

The arguments, in the course of which this historical evidence was considered, were resumed in the Court of Appeal on January 21, 1919 and heard on that and the two following days.<sup>1</sup>

Judgment was delivered on April 9, 1919<sup>2</sup> allowing the appeal. The Master of the Rolls (Sir Charles Swinfen-Eady)<sup>3</sup> and Lord Justice Warrington delivered judgment in favour of the Suppliants, while Lord Justice Duke<sup>4</sup> dissented.

The following declaration was made :

‘ That the Suppliants are entitled to a fair rent for use and occupation of De Keyser’s Royal Hotel on the Thames Embankment in the City of London by way of compensation under the Defence Act, 1842.’

<sup>1</sup> Mr. P. O. Lawrence having on November 6, 1918, been raised to the Bench as a Judge of the Chancery Division, Sir John Simon, K.C.V.O., K.C., was instructed to appear as leading counsel for the Suppliants. The Great Seal having on January 30, 1919, been delivered to Sir Frederick Smith, who on being raised to the peerage took the title of Baron Birkenhead in the County of Chester, Sir Gordon Hewart was on January 30 appointed Attorney-General, Mr. Ernest Pollock, K.C., M.P., at the same time succeeding him in the office of Solicitor-General and being subsequently knighted.

<sup>2</sup> (1919) 2 Ch. 197. In the opinion of the majority, the premises were occupied and taken by the consent of the owners in such circumstances as to raise an implication of a contract to pay for the use of the property. This view of the facts was not put forward by the Suppliants on the appeal to the House of Lords, their case being based on an implied obligation of payment either at Common Law or by statute where property is taken for purposes of defence.

<sup>3</sup> Sir Charles Swinfen-Eady (who had resigned his office on October 31, 1919, and had been raised to the peerage on November 1, under the title of Baron Swinfen of Chertsey in the County of Surrey), died on the 15th of November of that year.

<sup>4</sup> Appointed President of the Probate, Divorce, and Admiralty Division, October 31, 1919.



The Crown appealed to the House of Lords, the Case being argued before Lords Dunedin, Atkinson, Moulton, Sumner, and Parmoor<sup>1</sup> on March 1, 2, 4, 5, 8, and 9, 1920. Their Lordships took time for consideration, and on May 10, 1920, unanimously delivered judgment dismissing the appeal.<sup>2</sup>

<sup>1</sup> Lord Wrenbury sat as one of the Lords of Appeal on the first and second days, but did not attend during the remainder of the proceedings. The possibility of an equal division of opinion was thereby obviated.

<sup>2</sup> The Judgments (which are reported *sub nomine Attorney-General v. De Keyser's Royal Hotel, Limited* (1920) A.C. 508) are set out in full, App. A, p. 168. The documents printed in Appendices C, E, and F have been selected from those which were printed for use in the Court of Appeal and in the House of Lords.

## CHAPTER II

### THE DEFENCE ACTS

#### I

At the outbreak of war in August 1914 there were in force in relation to the acquisition and user of land for purposes of defence the Defence Acts, 1842 to 1873<sup>1</sup> of which the principal act is the Defence Act, 1842. In the submission of the Suppliants these acts applied equally in peace and in war and provided for the payment of compensation for the temporary use and occupation of lands taken by the Crown for purposes of defence, and also for such loss and injurious consequences as follows from such occupation.

The advisers of the Crown claimed a right on

<sup>1</sup> 5 & 6 Vict., c. 94; 17 & 18 Vict., c. 67; 22 Vict., c. 12; 23 & 24 Vict., c. 112; 28 & 29 Vict., c. 65; and 36 & 37 Vict., c. 72. These statutes may be cited by the collective title of 'the Defence Acts, 1842 to 1873' (Short Titles Act, 1896, 59 & 60 Vict., c. 14). Reference may also be made to the Military Lands Acts, 1892 to 1903, which comprise the Military Lands Acts, 1892 (55 & 56 Vict., c. 43); 1897 (60 & 61 Vict., c. 6); 1900 (63 & 64 Vict., c. 56); and 1903 (3 Edw. VII, c. 47); to the Territorial and Reserve Forces Act, 1907 (7 Edw. VII, c. 9, s. 4), and to the Ranges Act, 1891 (54 & 55 Vict., c. 54) which, as repealed in part by section 28 of the Military Lands Act, 1892, provides for the settlement by arbitration of the compensation for land acquired under the Defence Acts. As regards Admiralty Lands, *vide* the Admiralty Lands and Works Act, 1864 (27 & 28 Vict., c. 57); the Naval Works Act, 1895 (58 & 59 Vict., c. 35, s. 2); and the Naval Lands (Volunteers) Act, 1908 (8 Edw. VII, c. 25).

behalf of the Executive Government to enter into temporary occupation of land in time of national emergency free from any legal obligation to pay compensation. That claim was based on the alleged powers of the Crown at Common Law in virtue of the Royal Prerogative existing in time of war, such powers being (it was contended) independent of and neither abated, abridged, nor curtailed by legislation. The existence and extent of the prerogative powers of the Crown; the effect upon such powers of statute; and the right to take possession under the powers conferred upon the executive by legislation passed to meet the emergencies, arising out of the war, are reserved for consideration in later chapters after first examining the statutory provisions relating to the occupation of land which were in force at the outbreak of war. The Act of 1842 is by no means the first statute dealing with compulsory acquisition of land for purposes of defence either in peace or in war. So far is this from being the case that the Act will be found to be a consolidating and amending statute founded upon earlier statutes and particularly the Defence Act of 1804<sup>1</sup> enacted in the emergency of the Napoleonic wars. This Act was in force when the Act of 1842 was passed and is repealed by that Act.

An historical examination of the earlier statutes throws considerable light not only on the origin of the existing acts, but on the conceptions which underlay the action of the Executive and of Parliament in regard to the prerogative powers of the Crown at Common Law to enter upon the land of the subject in time of war. The practice during the

<sup>1</sup> 44 Geo. III, c. 95.

Napoleonic wars of relying solely on powers expressly conferred by statute, taken in conjunction with a uniform practice dating from still earlier times of making compensation, and with the absence of the assertion of any claim to act by virtue of Prerogative powers derived from the Common Law, if established, renders it difficult to accept the existence of any such prerogative. It is from this point of view as well as by way of illustrating the history and position of the Defence Act, 1842 in our constitutional system that it is necessary to consider the earlier statutes.

Although the statutory history of the modern Defence Acts may be said to commence in the reign of Anne, references to legislation on the subject of the acquisition of land by the Crown for purposes of defence are to be found in the reign of Charles II. Thus in 1681 an Ordnance Minute relating to the fortification of Hull, records an order that a statement be prepared, after inquiring as to 'what measures were taken and what course was used aboute takeing in of the lands for the new works at Plymouth and after what method the owners of those lands were satisfied and paid for the same' and gives a direction 'to see what statutes there are concerning takeing up of peoples lands for building of fortifications upon'.<sup>1</sup> In this instance the question arose in time of peace and was confined to the permanent acquisition of land. The only

<sup>1</sup> Ordnance Minutes (War Office Records), App. F, p. 284. The only statute dating from earlier times which has been discovered is an Act of 4 Hen. VIII (1512), authorizing entry on land for the making of bulwarks by every one of the King's subjects in anticipation of an apprehended invasion of Cornwall, see p. 50, *post*, and App. B, p. 220.

statute which has been traced in this period is an Act of 1672<sup>1</sup> which confirms an agreement for payment of the purchase money and for vesting and settling in the Crown the fee simple of lands 'which have been taken into and spoyled by makeing new fortifications about the Towne of Portsmouth'. The land was apparently taken in time of peace although possibly in anticipation of the outbreak of the second Dutch War which commenced on the 17th March 1672, and continued until 1674.

## II. *Legislation before the Defence Act, 1798.*

In 1708 a statute was enacted<sup>2</sup> in a form which was employed with modifications throughout the eighteenth century. This Act was passed during the war of the Spanish Succession (the battle of Oudenarde was fought on the 11th of July of that year). The Act of Union with Scotland in the previous year had aroused the adherents of the Pretender, who put to sea from Dunkirk in March but failed to effect a landing, his fleet being dispersed by Admiral Byng. Whatever may have been the emergency, the Act relates only to the compulsory acquisition by purchase, the preamble being as follows :

'Whereas for the better securing her Majesty's docks, ships of war and stores, 'tis highly necessary

<sup>1</sup> 22 & 23 Car. II, no. 43. This Act is not printed in any edition of the Statutes and is taken from the Parliament Roll, see App. B, p. 226. The object of the Act was merely to give effect to an agreement. It is referred to as an early instance of a statutory agreement for compensation following upon a taking of land which may or may not have been unlawful, and as the first statute of the kind which has been traced ; and also for its form, which is to some extent followed in the later Acts.

<sup>2</sup> 7 Anne, c. 26.

to enlarge or strengthen the fortifications at or near Portsmouth, Chatham, and Harwich, and in order thereto to purchase several lands, tenements and hereditaments, some of which are or may be the estates of infants, femmes covert, ecclesiastical corporations, or other persons who by law are disabled to make any contracts or conveyances; in all which cases, as likewise where any proprietors designing to obstruct the public service or to make any unreasonable gain to themselves, insist on extravagant rates, 'twill be necessary to have recourse to the usual methods that have been taken in such like cases.'

The reference to the 'usual methods that have been taken in such like cases' (which occurs also in a later Act of 1782)<sup>1</sup> is obscure, but would seem to point to some settled form of procedure for assessing compensation in default of agreement. This no doubt involved an inquisition and verdict by a jury, an early instance of which is to be found in 1664, albeit in time of peace, when one Clark, the storekeeper at Portsmouth, was directed by the Office of the Ordnance to 'treat once more with the proprietors' of ground at Portsmouth 'and bring them if possible to reasonable terms' and in the event of his failing to arrive at an agreement to 'desire' the Mayor or Aldermen to appoint a jury to value the property.<sup>2</sup>

Many similar statutes were passed from time to time, some in peace and some in war, all of which, although in form public acts, relate to particular localities and are in this sense 'local'. Thus statutes were passed in 1757 and 1758 during the

<sup>1</sup> 22 Geo. III, c. 80, p. 20 *post*.

<sup>2</sup> Ordnance Minutes: War Office Records, Class 47, vol. vi, fo. 16, see App. F, p. 279.

Seven Years' War dealing with fortifications at Milford<sup>1</sup> and at Portsmouth, Chatham, and Plymouth.<sup>2</sup> The state of affairs in 1757 presented, in the words of Pitt, 'a gloomy scene for this distressed disgraced country'<sup>3</sup> while, according to Burke, 'the Nation trembled under a shameless panic too public to be concealed, too fatal in its consequences ever to be forgotten.'

The constitutional lawyer, faced with the fact that in a year of extreme national peril, it was thought necessary to invoke the aid of Parliament, in order to acquire private property for the urgent needs of national defence, is driven to ask himself whether this does not indicate that the prerogative powers of the Crown were regarded as more limited in scope and application than was sometimes supposed during the late war. Why should the Ordnance department procure statutory authority to take over land needed to resist a threatened invasion, if the Crown had a right quite independently to do what it pleased with private property without making compensation so long as this was necessary for the defence of the Realm?

The gloom of 1757 was soon dissipated by the glorious successes, both in the new world and in the old, of 1759, but the fact remains that at a time when it could hardly have been anticipated how

<sup>1</sup> 31 Geo. II, c. 38 ; 32 Geo. II, c. 26 ; 32 Geo. II, c. 30.

<sup>2</sup> 31 Geo. II, c. 39 ; 32 Geo. II, c. 30. Ancillary provisions relating mainly to the application of moneys payable for compensation are contained in an Act of 1760 (33 Geo. II, c. 11), which also provides for taking down and removing a magazine at Greenwich and for the erection of a new one at Purfleet.

<sup>3</sup> For a full account of the military and political situation, see Worsfold, *Life of Pitt*, i. 337.

the tide of the national fortunes would turn at Quebec, at Plassey, and at Quiberon Bay, Parliamentary authority should have been required to secure the ground necessary to fortify the arsenals at Chatham and Portsmouth.

The emergency is recited in the preamble to the Act of 1757<sup>1</sup> providing for fortifications at Portsmouth, Chatham, and Plymouth in these terms :

‘Whereas by the unjust and hostile invasion lately made on his Majesty’s Dominions in America and the Mediterranean and by great preparations made in France for invading these Realms, it became absolutely necessary for the Security of his Majesty’s Docks Ships of War and Stores to erect and raise Fortifications and Intrenchments near the Docks of Portsmouth Chatham and Plymouth : And whereas certain lands herein after particularly mentioned lying near the said Docks of Portsmouth Chatham and Plymouth have been made use of in making Intrenchments and raising Lines and Fortifications, for the Defence and security of the said Docks : And whereas some part of the said Lands made use of for that purpose lies open and in common to many Owners and Proprietors of Lands near adjoining, for which they claim a Right of Common of the said Lands and other parts of the said Lands so made use of are so limited by Settlement that the Owners thereof cannot make a clear Title and Conveyance, without the authority of Parliament and other parts of the said Lands may be the Property of Ecclesiastical Persons, or Persons not capable of making a legal Conveyance thereof ; and all the said Lands may be subject and liable to Quit-Rents, Tythes, and other small Outgoings, from which the Owners thereof may not, without the Authority of Parlia-

<sup>1</sup> 31 Geo. II, c. 39.



ment be able to discharge the said Lands: And whereas many of the Owners and Proprietors of the said Lands so made use of (to make an unreasonable Gain to themselves) may insist on large and extravagant Demands for the damage and injury they may pretend to have sustained by means or reason of erecting the said Fortification: And whereas many Persons may pretend or claim to have Title to the same Lands so that it may be doubtful to whom a Compensation ought to be made which cannot be determined without the aid of Parliament: To the end therefore that the true and real value of the said Lands may be ascertained and the actual and real Owners and Proprietors may have a just and reasonable satisfaction for the said Lands or for any claim or Right thereto. . . .'

From this recital it would appear that works were actually carried out before the passing of the Act. It may be that this points to possession having been taken either under a general power of the Crown by virtue of the prerogative to enter for purposes of defence, founded on the necessity for immediate action, the emergency being such as to justify the entry without awaiting Parliamentary sanction; or to a recognition that the entry was unlawful and required confirmation by an Act of Parliament. At all events the preamble contains no reference to any entry on lands having been made by virtue of prerogative powers, while the right of the subject to compensation is clearly recognized. A noteworthy feature of the Act is the distinct recognition of the rights of adjoining owners who 'have received any damage, by making and raising the said intrenchments, lines, and fortifications'.<sup>1</sup>

<sup>1</sup> 31 Geo. II, c. 39, s. 10. For the method of assessing damages under this section, see App. C, pp. 229, 236.

The coasts of Sussex, Kent, and Southampton are dealt with in the following reign, during the war with Spain. An Act of 1762<sup>1</sup> recites that :

‘Whereas the Coasts of Sussex Kent & Southampton lay open and exposed to the hostile invasions of His Majesty’s Enemies : And whereas our late most Gracious Sovereign Lord George the Second out of his paternal Affection, tendering the Welfare and Protection of his dutiful and loyal Subjects did order and direct the Master General Principal Officers of his Ordnance, to erect and build several Forts and Batteries, at convenient Distances upon the said Coasts : And whereas in pursuance of such Orders, Forts and Batteries have been erected by and with the consent of the Owners and Proprietors of the several Lands herein after mentioned on which the same are respectively erected.’

This recital, if it is to be taken as containing any reference, however indirect, to an exercise of prerogative powers, points to a restriction upon their exercise of which there is no reflection in the Portsmouth Act of 1757.<sup>2</sup> The works were erected in time of war, but ‘by and with the consent of the owners’. The entry on the lands as well as the execution of the works was purely consensual, subject to the assessment of the amount of compensation in accordance with the machinery provided. The right to enter lands otherwise than by agreement for the purpose of erecting fortifications • is similarly negatived by the preambles to Acts of 1780, 1782, and 1783, passed when the country was involved in war with the North American Colonies, and with France and with Spain which was termi-

<sup>1</sup> 2 Geo. III, c. 37.

<sup>2</sup> 31 Geo. II, c. 39.

nated in 1783 by the Peace of Versailles. The Act of 1780<sup>1</sup> recites that :

‘Whereas by reason of the hostile Intentions of the Courts of France and Spain to invade these Realms and of the great Preparations made in the said Kingdoms for that purpose it has become absolutely necessary for the present and future Protection and Security, as well of his Majesty’s Docks, Ships of War, and Stores, at Plymouth and Sheerness, as of the Passage of the River Thames at Gravesend and Tilbury Fort, to erect and raise additional fortifications and Intrenchments near the same : And whereas the lands herein after mentioned lying near the said Docks of Plymouth and Sheerness and also near the Passage of the River Thames at or near Gravesend and Tilbury Fort aforesaid, are wanted for the purpose of being made use of to erect and raise such Fortifications and Intrenchments : And whereas many of the Owners and Proprietors of the Land Tenements and Hereditaments necessary to be purchased may insist on large and extravagant Demands for the Purchase of such Lands Tenements and Hereditaments or for the Damages and Injury they may pretend that they shall sustain by reason of such Fortifications and Intrenchments : And whereas many persons may pretend or claim to have Title to the same lands Tenements and Hereditaments so that it may be doubtful to whom a Compensation ought to be made which cannot be determined without the aid of Parliament : To the end therefore that the true and real Value of such Lands Tenements and Hereditaments may be ascertained and the actual and real Owners and Proprietors may have a just and reasonable Satisfaction for such Lands, Tenements and Hereditaments, or for any claim or right thereto.’ . .

<sup>1</sup> 20 Geo. III, c. 38.

The Act of 1782<sup>1</sup> recites that it is

‘highly necessary to enlarge or strengthen the Fortifications at or near Portsmouth and Chatham and in order thereunto to purchase several Lands, Tenements & Hereditaments some of which are or may be the Estates of Infants, Femes-covert, Ecclesiastical Corporations or other Persons who by Law are disabled to make any Contracts or Conveyances in all which Cases as likewise when any Proprietors designing to obstruct the Publick service or to make any unreasonable Gain to themselves insist on extravagant Rates it will be necessary to have Recourse to the usual methods that have been taken in Cases of the like Nature: To the end therefore that the time and real Value of the said Estates may be ascertained and the Owners and Proprietors thereof may have a just and reasonable Satisfaction for the same.’

The reference in this recital to the ‘usual methods’ occurs as has already been pointed out in the Act of 1708.<sup>2</sup> Whatever may have been the precise nature of the procedure in 1708, the machinery has assumed a more or less stereotyped form at the time of these later eighteenth-century acts. Under the existing legislation this has been substantially modified; it may, however, be useful to examine the machinery, which was to some extent superseded by the Act of 1842 as illustrating the care with which the observance of somewhat complicated statutory provisions was enforced in times of national danger.

The execution of the acts was in all cases entrusted to Commissioners appointed by Letters Patent under the Great Seal. Except in cases in

<sup>1</sup> 22 Geo. III, c. 80, p. 14 *ante*.

<sup>2</sup> 7 Anne, c. 26.

which the lands to be taken are set out in the Act, the Commissioners are authorized to survey and set them out, and are given power to hear and determine in a summary way all the titles and claims to and controversies concerning such lands and to make such orders and decrees relating thereto as they may think proper, subject to the right of parties claiming to be interested to have such titles, claims, and controversies determined by a jury. After the making of a survey (or, in cases where the lands are set out in the Act, upon the passing of the Act) the lands are to vest in trustees for the benefit of the parties interested until payment of the purchase money. The Commissioners are empowered to treat and agree with the owners for purchase. In the event of refusal or neglect to treat and agree for thirty days after service of notice in writing or in case of infancy, coverture or other disability, the Commissioners are authorized to issue a warrant or warrants to the Sheriff of the County commanding him to summon a jury to assess the compensation. All orders, judgments, decrees, agreements, and verdicts are to be entered and engrossed and certified by the Commissioners to the Clerk of the Crown in Chancery and to the King's Remembrancer in the Court of Exchequer.

Certificates are to be given to the parties interested containing a description of the premises to which they relate and stating the amount which they are to receive. These certificates constitute an authority to the Surveyor-General of the Ordnance to make out bills to the parties entitled, upon which debentures are prepared by the Clerk of the Ordnance. Upon payment of the amount stated in such debentures by the Treasurer of the Ordnance

the trustees are to stand seised of the premises for the use of the Crown. In the event of any person refusing to accept a certificate, such certificate is to be deposited with the Clerk of the Peace, whereupon the Lands are to be vested to the use of the Crown as if such certificate had been received by the party or parties entitled thereto.

These Acts were in each case followed by a second Act which, after reciting the proceedings taken under the original Act, makes provision for the sums required out of moneys provided by Parliament and effects a final vesting of the lands in the Crown. These 'Vesting Acts', the principal object of which was to effect a final clearing of titles, follow the original Acts in every case until the procedure was simplified by the provisions of the Act of 1842.

The records preserved at the Record Office contain a number of Commissions, Decrees, and Inquisitions under the Acts passed during this period, including instances in which payment was ordered to be made as compensation for damage to the lands of adjoining owners as well as on account of purchase money for lands permanently acquired. An instance of a Commission issued under the Act of 1757 followed by Inquisition and Decree is printed in Appendix C<sup>1</sup> by way of illustration.

### III. *The Napoleonic Wars.*

The Acts thus far considered deal mainly with the permanent acquisition of land by purchase, and are restricted to the taking of land in particular localities. The legislation of 1798,<sup>2</sup> 1803,<sup>3</sup> and

<sup>1</sup> p. 229, *post*.

<sup>2</sup> 38 Geo. III, c. 27.

<sup>3</sup> 43 Geo. III, c. 55.

1804<sup>1</sup> presents several contrasts. In the first place the Defence Acts of those years are of general application, the powers conferred being exercisable under the Act of 1798 throughout England and Scotland, while the Acts of 1803 and 1804 apply also to Ireland, whose affairs had become subject to the control of the British Parliament since the Act of Union of 1801.<sup>2</sup> In the next place, the Acts of 1798 and 1803 are temporary, the Act of 1798 (as also that of 1803) providing (sect. 22) that it should 'have continuance during the present war with France'. It therefore lapsed on the conclusion of peace by the Treaty of Amiens on the 27th March 1802. War having broken out again on the 29th April 1803, a statute<sup>3</sup> was enacted in identical terms (except for a slight verbal alteration in the preamble) and received the Royal Assent on the 11th June. This Act remained in force until the Treaty of Vienna in 1815. Thirdly, the Acts of 1798 and 1803 deal with defence generally and not merely with the occupation of land. Fourthly, as regards land, the opinion was apparently entertained that the Acts provided only for temporary occupation and user. Accordingly the Act of 1804<sup>4</sup> which is an Act 'to amend certain provisions' of the Act of 1803, and recites that 'doubts have arisen whether the said provision of the said Act

<sup>1</sup> 44 Geo. III, c. 95.

<sup>2</sup> The Irish Parliament did not pass a Defence Act. A statute similar to the English acts relating to particular localities was enacted in 1717 (4 Geo. I, c. 7) for the fortification of Cork Harbour and was followed by the Acts of 19 Geo. II, c. 3; 23 Geo. II, c. 2; and 7 Geo. III, c. 6. An Irish Act of 1797 (37 Geo. III, c. 2) related only to voluntary enlistment.

<sup>3</sup> 43 Geo. III, c. 55.

<sup>4</sup> 44 Geo. II, c. 95.

extends to the purchasing or taking any lands or hereditaments for permanent purposes' proceeds (sect. 3)<sup>1</sup> to remove those doubts. Fifthly, these Acts provide in terms for payment out of public funds for the temporary user of land, and contain elaborate provisions for the method of obtaining possession and for the assessment of compensation in default of agreement. Finally, they contain no definite recital of any prerogative right of the Crown, unless the reference in the preamble to the powers by law vested in the Crown ought to be read as such. The reference can hardly amount to more than a general saving in somewhat wide terms of such powers as may have existed.

It is hardly necessary to dwell upon the emergency in which these Acts were placed upon the Statute book. The fear of invasion formed the constant pre-occupation of all classes from the spring of 1798 (the year of the Irish rebellion) when Napoleon commenced to assemble his forces at Boulogne until the final collapse of his projects of invasion in 1805 after the battle of Trafalgar.<sup>2</sup> The first general Defence Act<sup>3</sup> was introduced and read a first time in the House of Commons on March 27, 1798.<sup>4</sup> The bill was read a second time on the following day and committed to a committee of

<sup>1</sup> See p. 29, *post*.

<sup>2</sup> For a detailed account of the French preparations, see Desbrière, 1793-1805. *Projets et Tentatives de Débarquement aux Îles Britanniques*, published under the direction of the historic section of the French staff, 1900 to 1902. *Napoleon and the Invasion of England*, by Wheeler and Broadley, contains a lively and accurate account of the preparations and counter-preparations for invasion, see also Mahan, *Influence of Sea Power upon the French Revolution*, chaps. ix and xv.

<sup>3</sup> 38 Geo. III, c. 27.

<sup>4</sup> 53 Com. Journ. 426.



the whole house.<sup>1</sup> The third reading followed on April 2nd.<sup>2</sup> The bill was agreed by the Lords on April 4th<sup>3</sup> and received the Royal Assent on April 5th.

Here again, in 1798, the same reflection forces itself upon the mind of the student of prerogative law as was suggested by the Parliamentary action taken in 1757. The recourse to Parliament was presumably thought to be necessary, and if Parliamentary authority was necessary, authority by the mere exercise of the prerogative cannot have existed to the same extent and degree. And in this later instance, the authority sought is not for the permanent acquisition of private property for the purpose of national defence but for the temporary occupation needed.

As we shall see, the statutes then being passed, though on their true construction perhaps applicable both to temporary and permanent occupation, were liable to be construed as authorizing temporary occupation only, and were recognized as having this for their primary purpose in an Act of Parliament which was enacted a few years later. The objects of the Act of 1798<sup>4</sup> are recited in the preamble in the following words :

‘Whereas it is expedient that His Majesty should be enabled to exercise, in the most effectual Manner the Powers by Law vested in him for preventing and repelling an Invasion of this Kingdom by His Majesty’s enemies ; and that for such purpose, Provision should be made to enforce prompt Obedience to such Orders as His Majesty shall think fit to issue for procuring the Information necessary to

<sup>1</sup> Ibid. 436.

<sup>2</sup> Ibid. 440.

<sup>3</sup> 41 Lords’ Journ. 528.

<sup>4</sup> 38 Geo. III, c. 27.

the effectual exercise of such Powers upon any emergency ; and for applying in the most expeditious Manner, and with the greatest Effect, the voluntary services of his loyal Subjects for the Defence of the Kingdom ; and also to enable His Majesty to procure ground which may be wanting for erecting Batteries, Beacons and other Works, which may be deemed necessary for the public Service ; and also to provide for the Indemnity (in certain Cases) of Persons who may suffer in their Property by Measures which may be taken for the Defence and Security of the Country, and Annoyance of the Enemy.’

The Act<sup>1</sup> which is entitled ‘ An Act to enable His Majesty more effectually to provide for the defence and security of the realm during the present war and for indemnifying persons who may suffer in their property by such measures as may be necessary for the purpose ’ contains the following provisions with regard to land :

Sect. 10. ‘ That it shall be lawful for His Majesty to authorise any General Officer or Officers or other person or persons commissioned for such Purpose, to survey and mark out any Piece of Ground wanted for the Public service, and to treat and agree with the Owner or Owners thereof, or any Person or Persons having any interest therein, for the Possession or use thereof during such Time as the Exigence of the Service shall require ; and in case the Owner or Owners of any such Ground or any Person or Persons having any interest therein shall refuse or decline to enter into such contract the same as shall be satisfactory to such Officer or Officers, or other Person or Persons commissioned as aforesaid or shall be unable to do so by reason of Infancy, Coverture or other Disability it shall be lawful for

<sup>1</sup> 38 Geo. III, c. 27.

the Person or Persons so authorised by His Majesty to require two or more Justices of the Peace, or Deputy Lieutenants for the County, Riding, Stewartry, City, or Place, where such piece of Ground shall be, to put His Majesty's Officers into immediate possession of such Piece of Ground which such Justices or Deputy Lieutenants shall accordingly do, and shall for that Purpose issue their Warrant, under their Hands and Seals, commanding Possession to be so delivered, and shall also issue their warrants to the Sheriff of the County, Riding, Stewartry, City, or Place, wherein such piece of ground shall be situate, to summon a jury to appear, and be on a Day and at a Place on such Warrant to be mentioned to enquire of and ascertain the Compensation which ought to be made for the Possession or Use of such Piece of Ground during the Time for which the same shall be required for the Public Service, to the several persons interested therein, and to whom the same ought to be paid, the Verdict of which Jury shall be certified by such Justices or Deputy Lieutenants to the Receiver General of the Land Tax of the County, Riding, Stewartry, City, or Place, where such Lands shall lie, which Receiver General shall, out of any Money in his Hands pay such Compensation to such Person or Persons, in such Manner and for such Purposes as by such Verdict shall be directed, Provided Always that no such Piece of Ground shall be so taken for the Public Service, without the Consent of the Owner or Owners thereof unless the Necessity for the Same shall be first certified by the Lord Lieutenants or two of the Deputy Lieutenants of the County, Riding, Stewartry, City, or Place, in which such Land shall lie or unless the Enemy shall have actually invaded the Kingdom at the Time when such Piece of Ground shall so be taken.'

This section (as well as the corresponding section

of the Act of 1803<sup>1</sup> which is in identical terms) presents the following characteristics. In the first place 'use & possession' are alone specifically referred to, the section being silent with regard to permanent acquisition. Secondly, the surrender of possession is to be consensual, at all events in the first instance, the authorities being authorized to 'treat & agree'. Thirdly, in the event of the refusal or disability of an owner to treat, the procedure for assessing compensation which had already become usual in the earlier eighteenth-century Acts is to be followed, but provision is made for putting the officers of the Crown into immediate possession. Fourthly, land can only be taken in the absence of consent either where the necessity for taking is duly certified by the proper authority, or in the event of actual invasion.

The Acts of 1798 and of 1803 contain provisions<sup>2</sup> for the requisition of boats, wagons, and other chattels subject to compensation being made. These sections are considered hereafter<sup>3</sup> in connexion with the subject of chattels, but it is important to note that they provide for compensation for the destruction of buildings in the event of actual or of apprehended invasion, such compensation to be agreed with representatives appointed by the

<sup>1</sup> 43 Geo. III, c. 55.

<sup>2</sup> Sections 7 and 11. These sections are not reproduced in the Act of 1804, which deals only with permanent acquisition. It should be noted that the Act of 1803 remained in force until the end of the war in 1815. For the opposition in Parliament to the policy of 'driving the country' on the ground of the doubtful advantage of anticipating damage which an enemy might ultimately fail to inflict, see 36 Parl. Hist. 142.

<sup>3</sup> p. 142, *post*.

Treasury for that purpose and in default of agreement by two Justices of the Peace.

Before the lapsing of the Act of 1803 at the conclusion of the War in 1815, it had been amended by the Act of 1804<sup>1</sup> which is the first permanent Act of general application. That this Act covers both permanent acquisition and temporary user is made clear by section 3 which provides :

‘And be it further enacted, That it shall be lawful for his Majesty, or for the Lord Lieutenant or other Chief Governor or Governors of Ireland for the Time being in Ireland, from Time to Time to authorise any General Officer or Officers, or other Person or Persons Commissioned for that purpose to survey and mark out any Lands or Grounds wanted for the publick Service and to treat and agree with the Owner or Owners thereof or any Person or Persons interested therein, either for the absolute purchase thereof for the Publick Service, or for the Possession or Use thereof, during such time as the Exigence of the publick Service shall require.’

Provision is also made by section 11 for the removal from lands taken for a term of years or for such period as the exigency of the public service may require of buildings and other erections which have been placed thereon before the lands are restored to the owner and for the payment of compensation by agreement or by assessment by a jury for all damage sustained by the erection of buildings ‘or otherwise in consequence of the same having been occupied for the public service’.<sup>2</sup>

<sup>1</sup> 44 Geo. III, c. 95.

<sup>2</sup> The section was held by the Court of Appeal in Ireland, FitzGibbon, L. J., dissenting (*Incorporated Society v. The Queen* (1900) 1 I.R. 465), not to impose on the Crown an obligation

Reference has already been made to the fact that the Act of 1804 remained in force until 1842 and that the Defence Act of that year, by which it was repealed, is closely modelled upon its provisions.

Assuming a prerogative right to have existed at any time by virtue of which the Crown was entitled to the temporary user of lands in times of national emergency, free from any legal obligation to make compensation, how far is the existence of such a right to be traced during the Napoleonic Wars? That the Executive in fact acted under Statutory powers is clear upon an examination of the Defence Acts and the contemporary records. Whether any such prerogative right with respect to land could have survived this legislation is in effect one of the questions raised in the Case. So far as the modern acts are concerned that question has now been determined: the Crown is bound by the Defence Acts and has no right to elect to proceed otherwise than under statutory powers. No record is to be found in the reports of any claim by the Crown to take land under Common law powers during the Napoleonic wars, and the historical evidence which will be examined in dealing with the prerogative at Common Law discloses no trace of any claim at this period to act otherwise than by agreement or under the statutes. It remains to consider how far, if at all, contemporary statesmen concerned themselves with the question.

In the light of the contentions discussed in the Case the conception entertained by the Government of the day of the executive powers entrusted to it to restore the land to its original condition, or to make compensation for damage done. It is respectfully submitted that this decision is open to question.

by the constitution naturally suggests itself as a subject of inquiry. That Pitt was not unmindful of the lessons of the past appears from the fact that he obtained from John Bruce, the Keeper of the State Paper Office, a detailed report of the arrangements for the defence of the Kingdom at the time of the Spanish Armada. Bruce's report<sup>1</sup> deals mainly with the raising and disposition of the forces, the protection of shipping in the ports and the provision of security against the enemy's approach to the capital. In regard to the execution of works, full provision is made for payment for labour and material, but the report is silent upon the subject of payment for the occupation of land. Whether or not a practice obtained in the time of Elizabeth to compensate owners of land in the circumstances which prevailed in 1586, the question does not appear to have been discussed two centuries later when the Act of 1798 was before Parliament. On the contrary the Government proceeded upon the view that losses incurred by individuals in the general interest should be made good by the State, and this was made abundantly clear by the Secretary of State for the War Department,<sup>2</sup> who in introducing the Bill informed the House that:

‘ One great provision in the Bill will be to make compensation to those who shall suffer by the attempts of the enemy and the measures taken to resist them ; and in order that no person may be induced to withdraw his stock from the general service of the country, or may suffer from any part his stock being destroyed by the enemy, or appropriated by the country for this purpose, the pro-

<sup>1</sup> App. D, p. 247. A MS. copy is in the British Museum. The report was printed for official use.

<sup>2</sup> Henry Dundas, afterwards Lord Melville.

visions of the Bill go to render indemnification certain. . . .

It must occur to every one that in the prospect of an invasion it will become necessary, in particular districts though it is impossible to point where at present, to erect covers for batteries, and to raise works in critical situations where the operations of the enemy are most likely to be directed, for this purpose it may be found necessary that pieces of ground should be appropriated for such erections ; but if it is expedient to check the attempts of the enemy by such means, it is no less so that it should be fully understood that complete indemnification will be made, and that no man will suffer by any aid which he may contribute to the public service.’<sup>1</sup>

It is apparent, therefore, that whatever reservations may have been intended by the reference in the preamble to the powers by law vested in the Crown for preventing and repelling an invasion, the right of the subject to compensation was fully recognized in the clearest possible language. The prerogative was not invoked either in 1798, or when the Statute of that year was re-enacted in 1803. But the assumption that the Governments of the day were ignorant of their executive powers at Common Law or unwilling to exercise them in a proper case cannot be justified in the light of the

<sup>1</sup> 33 Parl. Hist. 1358. So in *R. v. Abbott* (1897) 2 I.R. 362 (a decision under the Defence Act, 1842). O’Brien, L. C. J., says (p. 405) : ‘ The safety of the State is best secured by a general average contribution, and not by making jettison of individual interests.’ Presumably the Government took the advice of the Law Officers. The Attorney-General in 1798 was Sir John Scott, afterwards Lord Eldon ; the Solicitor-General was Sir John Mitford, afterwards Lord Redesdale. The fact that Parliament at this time was composed almost entirely of landowners may have had some influence upon the policy of the Government.



legislation of the latter year. The Defence Acts of 1798 and of 1803 dealt, among a number of other matters, with the enrolment of men who should be willing to engage themselves for service in the Defence of the United Kingdom. In 1803 these provisions were found to be insufficient and the Government promoted and carried legislation containing elaborate provisions for compulsory enrolment and training. One of the Acts by which this object was sought to be effected<sup>1</sup> is entitled,

‘An act to amend and render more effectual, an Act passed in the present Session of Parliament intituled, An Act to enable his Majesty more effectually to provide for the Defence and Security of the Realm during the present War, and for indemnifying persons who may suffer in their property by such measures as may be necessary for that Purpose; and to enable his Majesty more effectually and speedily to exercise his ancient and undoubted Prerogative in requiring the Military Service of his liege Subjects in case of Invasion of the Realm.’

In the debate on the Bill on July 18, Pitt, in explaining that the object of the measure was that when people were called out they should be trained to military evolutions, claimed for the Crown a prerogative ‘whenever the country is threatened with invasion to call out all subjects for defence’—a position which was not challenged in debate.<sup>2</sup> But in 1804 Fox, who had followed Pitt in the debate on the Military Service Bill of 1803 and had confined himself to the contention that the measure would not prove effective, moved that it be referred to a committee of the whole House to revise the

<sup>1</sup> 43 Geo. III, c. 96.

<sup>2</sup> 36 Parl. Hist. 1642.

several bills for the defence of the country, and took exception to the recital in the Military Service Act of 1803,<sup>1</sup> which, he suggested, had been overlooked.<sup>2</sup> Pitt supported the motion (which was defeated) but maintained his position with regard to the Common Law right of the Crown to call for military service for purposes of defence. 'Nothing appears clearer' (he said) 'than the proposition that the State has the right to call the people to defend it, and that in the Crown, being the depositary of the power of the State, is vested the right of so calling upon the people in a great emergency. The right is recognized by the Constitution and custom of the country—a right inherent in the Crown to exercise this right according to necessity of such case as may arise and to be limited by that necessity. . . . As such is the undoubted right and prerogative of the Crown, I should think that legislative provision should, in the present juncture, a little anticipate the justifiable necessity—at least so far as to put every man in the maritime counties likely to be the seat of the enemy's attempt under the immediate power of the Crown in case of actual or imminent danger of invasion.'<sup>3</sup> The discussion which followed is confined entirely to the right to demand military service. In relation to the compulsory occupation of land under powers not conferred by statute the complete silence which attended the introduction of the Defence Acts of 1798, of 1803, and of 1804 remains unbroken.

So far, therefore, the statutory law on this subject

<sup>1</sup> 43 Geo. III, c. 96. The prerogative is recited in identical terms in an amending act of the same Session (c. 120).

<sup>2</sup> Cobb, *Parl. Deb.* ii. 194.

<sup>3</sup> *Ibid.* 222.

follows in the first instance the line of authorizing the specific appropriation of private lands by the Crown in defined localities, or during a special emergency, where such lands are required for national defence. Later it provides by way of permanent enactment for the exercise by the Crown under certain safeguards, of a power to take property for the defence of the realm when and where the needs of the country justify a requisition. So matters remained until the fourth decade of the last century—a period when Parliament devoted itself to framing a series of consolidating statutes, each of which would constitute a general and permanent code. The Defence Act, 1842 is an instance of the parliamentary activity which followed the passing of the first Reform Bill, other examples of which are the amendment and consolidation of the law relating to Municipal Corporation and of the Poor Law, and the legislation relating to railways, and to the compulsory acquisition of land for public purposes.

#### IV. *The Defence Act, 1842.*<sup>1</sup>

The Defence Act of 1804 was repealed, together with statutes containing minor amendments<sup>2</sup> by the Defence Act, 1842, which is closely modelled on the Act of 1804 and is expressed to a great extent in the same language.<sup>3</sup> Both statutes cover the same ground.

<sup>1</sup> 5 & 6 Vict., c. 94. For the amending Acts, see p. 10, note 1, *ante*.

<sup>2</sup> 1 & 2 Geo. IV, c. 69 (1821); 3 Geo. IV, c. 108 (1822); 2 & 3 Will. IV, c. 25 (1832).

<sup>3</sup> Per Lord Dunedin, App. A, p. 174. See also *R. v. Abbott* (1897), 2 I.R., p. 406.

The Act of 1804 was passed in time of war but was applicable to times of peace ; the Act of 1842 was passed in time of peace and has now been finally held to apply in time of war.

The principal provisions are as follows :

Sect. 16. ' That it shall be lawful for the principal Officers of Her Majesty's Ordnance<sup>1</sup> for the Time being to enter on, survey and mark out, or to cause to be surveyed and marked out, any Lands, Buildings, or other Hereditaments or Easements wanted for the service of the Ordnance Department, or for the Defence of the Realm, or to stop up or divert any Public or Private footpaths or Bridle-roads, and to treat and agree with the Owner or Owners of such Lands, Buildings, Hereditaments, or Easements, or with any Person or Persons interested therein either for the absolute purchase thereof, or for the Possession or Use thereof during such Time as the Exigence of the Public Service shall require.'

Sect. 18. ' It shall be lawful . . . to contract and agree with such principal Officers either for the absolute sale of such Lands, Buildings or other Hereditaments, or for the Grant of any Lease, either for any Term of Years certain therein, or for such Period as the Exigence of the public Service shall

<sup>1</sup> The functions of the Principal Officers of the Ordnance were transferred to the Principal Secretary of State for War by the Ordnance Board Transfer Act (1855) (18 & 19 Vict., c. 117). For the history of the Ordnance Board and of the Barrack Department, see Clode, *Military Forces of the Crown*, i. 74, 253 ; ii. 204, 238-251, 683. The separation of powers between these two departments is due to the historic fear of a standing army and the consequent restrictions on the erection of barracks. Cf. Blackstone, i. 413, ' the soldiers should live intermixed with the people, no separate camps, no barracks, no inland fortress should be allowed '. This separation survives in the proviso to section 19 of the Defence Act, 1842 (which is amended by 22 Vict., c. 12, s. 4).

require, and to convey, surrender, demise, or grant the same to such principal Officers, in Trust for Her Majesty, Her Heirs, and Successors, accordingly; and all such Contracts, Sales, Conveyances, Surrenders, Leases and Agreements shall be Valid and effectual in Law to all Intents and Purposes whatsoever.'

Sect. 19. 'That in case any such Bodies or other Persons hereby authorized to contract on behalf of themselves or others as aforesaid, or any other Person or Persons interested in any such Lands, Buildings, or other Hereditaments which shall be so marked out and surveyed as aforesaid shall for the space of Fourteen Days next after Notice in Writing subscribed by or on behalf of the said principal Officers shall have been given to the Chief Officer or Officers of any such Body, or to such other Persons hereby authorized to contract on behalf of others, or interested themselves, as aforesaid, or left at his, her or their usual Place of Abode, refuse or decline to treat or agree, or by reason of absence shall be prevented from treating or agreeing with the said principal Officers, or shall refuse to accept such sum of money as shall be offered by the said principal Officers as the Consideration for the absolute Purchase of such Lands, Buildings, or other Hereditaments or such annual Rent or Sum as shall be offered for the hire thereof, either for a Time certain or for a period as the Exigence of the public Service may require, then and in such case it shall be lawful for the said principal Officers to require two or more Justices of the Peace or Three or more Deputy Lieutenants (One of whom shall be a Justice of the Peace) or two or more Deputy Governors for the County, Riding, Stewartry, City or Place where such Lands, Buildings or other Hereditaments shall be, to put the said principal Officers, or any Person appointed by them, into immediate Possession of such Lands, Buildings or other Hereditaments which such Justices or Deputy

Lieutenants or Deputy Governors are hereby required to do, and shall for that purpose issue their Warrants under their Hands and Seals commanding Possession to be so delivered and shall also issue their Warrants to the Sheriff of the County, Riding, Stewartry, City, or Place wherein such Lands, Buildings or Hereditaments shall be situate to summon a Jury<sup>1</sup> . . . and the Jury on hearing any Witnesses and Evidence that may be produced shall on their Oaths (which Oaths as also the Oaths of such Witnesses, the said Justices, Deputy Lieutenants or Governors respectively are hereby empowered and required to administer) find the Compensation to be paid either for the absolute purchase of such Lands, Buildings or other Hereditaments or for the Possession or Use thereof, as the Case may be.'

The marked resemblance borne by these sections to the corresponding provisions of the earlier legislation and more particularly of the Act of 1804 requires no comment, while that resemblance is no less close when the remaining provisions of the Act come to be considered in detail. The Act is built up on the framework of the Act of 1804 and to a great extent adopts its precise language.<sup>2</sup>

<sup>1</sup> The powers given to promoters of undertakings under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18) are by section 7 of the Lands Clauses Consolidation Act, 1860 (23 & 24 Vict., c. 106) made available in respect of land wanted for the service of the Admiralty or of the War Department or for the Defence of the Realm. Section 11 of the Ranges Act, 1911 (54 & 55 Vict., c. 54) enables the acquiring authority to require compensation to be settled by arbitration instead of by reference to a jury. For the measure of compensation (which includes injurious affection of adjoining lands), see *Blundell v. The King* (1905), 1 K.B. 516; following *R. v. Abbott* (1897), 2 I.R. 362; and *In re Ned's Point Battery* (1903), 2 I.R. 192.

<sup>2</sup> See note (3), p. 35, *ante*.

The reference to temporary occupation in the expression 'during such time as the exigency of the public service shall require', which is taken from section 10 of the Act of 1798, furnishes the best instance of such literal adoption. On what ground, then, can the Act be said to be inapplicable to the facts of the Case? Is there any emergency left uncovered by the Act and therefore necessitating recourse to such prerogative powers as may exist? That the Act applies in time of war is clear from the provisions of section 23, which is in the following terms:

'No such Land, Buildings or other Hereditaments shall be so taken without the Consent of the Owner or Owners thereof, or of any such Person or Persons as aforesaid acting for or on the Behalf of the Owner or Owners thereof, unless the Necessity or Expediency of taking the same shall be first certified by the Lord Lieutenant, or Two of the Deputy Lieutenants, or by the Governor or two Deputy Governors of the County, Riding, Stewartry, City, or Place in which such Lands, Buildings or other Hereditaments lie, and unless the taking of such Lands, Buildings or other Hereditaments be authorised by a Warrant under the Hand or Hands of the Lord High Treasurer or of the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, for the time being, or any Three or more of them or unless the Enemy shall have actually invaded the United Kingdom at the time when such Lands, Buildings or other Hereditaments shall be so taken.'

Actual invasion is therefore provided for: and in such case the officers of the Crown are authorized to take possession without observing the prescribed formalities, such as obtaining an order for possession under section 19, or a certificate under section 23.

These formalities, in fact, have a direct bearing upon the argument. If they must be complied with whatever may be the emergency, it is possible to imagine cases in which the duty of compliance might call for the exercise of powers by which the statutory duty would be overridden. No such necessity arose in the Case, for the officers of the Crown were content to negotiate until they failed to come to terms. Conceivably an emergency might arise in which the Crown would be justified in acting without complying with the statutory requirements, more especially when Parliament is not sitting.<sup>1</sup> Such a case, however, is purely hypothetical in relation to the conditions prevailing in 1916 for the reason that it was covered by the express statutory provisions of the Defence of the Realm Consolidation Act, 1914,<sup>2</sup> by section 2(2) of which power is given 'to provide by regulation for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws or any other powers under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903'.<sup>3</sup> It is therefore in the words of Lord Moulton<sup>3</sup> 'a sound inference from the language of subsection (2) that the Legislature intended that so far as the acquisition or user of Land was concerned, the Regulations should take the form of action under the Defence Act, 1842, facilitated by suspension of some or all of the restrictions which it imposes'. In fact, 'if formalities not inconsistent with the exigencies of a state of war in 1842 would have been prejudicial to the public service in 1916, the powers given by

<sup>1</sup> See p. 66, *post*.

<sup>2</sup> 5 Geo. V, c. 8. See p. 84, *post*.

<sup>3</sup> App. A, p. 193.



subsection (2) of section 1 of the Act of 1914 had only to be exercised, as in fact they were and all these difficulties would vanish.’<sup>1</sup>

The whole field, therefore, of the prerogative in the matter of the acquisition of land or rights therein is covered by the Act,<sup>2</sup> and the Act makes full provision for the payment of compensation for lands taken.<sup>3</sup> Whether in these circumstances the Crown is entitled to rely on any prerogative powers independent of Statute remains for consideration in a later chapter.

<sup>1</sup> Per Lord Sumner, App. A, p. 201.

<sup>2</sup> Per Lord Dunedin, App. A, p. 174. Section 34 contains a saving of the prerogative with regard only to litigation. See p. 109, *post*.

<sup>3</sup> The point that the obligation to make compensation is not a ‘restriction’ is dealt with at p. 88, *post*.

## CHAPTER III

### THE PREROGATIVE OF THE CROWN

#### I

THE contentions raised on behalf of the Crown have been set out in outlining the history of the Case.<sup>1</sup> It is now proposed to examine the claim to enter upon and occupy lands by virtue of powers derived from the Royal Prerogative, that is to say, under the Common Law independently of Statute. Lord Sumner in his judgment<sup>2</sup> points out that the Crown 'throughout purported to act on statutory rights (whether fully or correctly referred to or not) and the prerogative has not been vouched except in argument in the present case. I do not mean that it is not open to the Law Officers to rely on the prerogative now or that I assume the writer of the letter dated 29th April 1916 to have had any authority to bind the Crown by an election between its statutory and prerogative rights. If, however, under the Statutes, including the Defence of the Realm Acts, which deal with taking buildings for the public safety and the Defence of the Realm, the Crown had the power to requisition this building on terms as to compensating the Respondents, I think it cannot contend now that by the course taken the exercise of statutory powers was excluded, and that none were in fact exercised.'

Such Common Law powers of the Crown therefore, as can be exercised under the Royal Preroga-

<sup>1</sup> *Ante*, p. 4.

<sup>2</sup> App. A, p. 198.

tive, require to be considered only if the facts of the case are not covered by Statute binding on the Crown. In the Suppliants' submission the Defence Act, 1842 applied and gave a statutory right to compensation. The advisers of the Crown on the other hand, while contending that the Defence Act had no application, relied on the Defence of the Realm Acts and Regulations as excluding the right to compensation, and maintained that if that right was not expressly excluded, it was inconsistent with a right claimed on behalf of the Crown at Common Law, not only to requisition private property, but to do so free from any legal obligation of payment. It therefore becomes necessary to examine the nature and extent of the alleged Common Law powers.

In considering the prerogative in relation to the questions arising in the Case, it is happily now unnecessary to review the controversies which culminated in the great historical documents such as Magna Carta or the Bill of Rights upon which our constitutional liberties are based. No one would suggest in these days that the Sovereign would incur personal responsibility for any action of the executive government—still less that the King himself would claim to be in any respect above the law. On the contrary 'the King has not any Prerogative but such as the law allows',<sup>1</sup> a principle which applies both to the personal status of the Sovereign, and also and in no less a degree to such powers as are exercised in the name of the King by the Executive. The Crown

<sup>1</sup> *The Case of Proclamations* (1611) 12 Rep. 74; 77 E.R. 1352.

has been aptly described as a convenient working hypothesis based on the theory that 'while the making of laws is entirely the work of the legislature, the circumstances of putting the law into execution must frequently be left to the discretion of the executive magistrate'.<sup>1</sup> The discretion is in fact delegated and its exercise is largely circumscribed by statutory enactment. Prerogative is the residue of that executive power which the King in the early stages of our history once possessed in all the departments of Government.<sup>2</sup> This power, reduced in compass and limited in exercise by many conventional and practical restrictions, remains as 'that discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'<sup>3</sup> and 'every act which the executive government can lawfully do without the authority of an Act of Parliament is done by virtue of this prerogative'.<sup>4</sup> The extent of this authority is not easy to define.

'We find', says the late Professor Maitland,<sup>5</sup> 'that there is often great uncertainty as to the exact limits of the royal prerogative. Since the settlement of 1688 very little has been done towards depriving the King by any direct words of any of his legal powers. Those powers were great and they were somewhat indefinite. Very seldom has any statute expressly taken them away, very seldom has any statute said in so many words "it shall not be lawful for the King to do this". But without

<sup>1</sup> Blackstone, *Comm.*, i. 270.

<sup>2</sup> Anson, *Law and Custom of the Constitution*, vol. ii, pt. i (3rd ed.), p. 3.

<sup>3</sup> Dicey, *Law of the Constitution* (8th ed.), p. 420.

<sup>4</sup> *Ibid.*, p. 421.

<sup>5</sup> *Constitutional History of England*, p. 418.

directly destroying these prerogative powers statutes have created a large number of powers dealing with the same matters, some given to the king, some to one or to another of his great officers. Such modern powers have been definite and adapted to the wants of modern times, and they have been freely used. On the other hand the old prerogative powers have become clumsy and antiquated, and have fallen into disuse; the very uncertainty as to their limits has made them impracticable. Still they have not been expressly abolished, and to the legal student the question must often occur whether they are or are not in existence. Remember this, that we have no such doctrine as that a prerogative may cease to exist because it is not used. On the other hand we shall often find that it would be extremely difficult to use these prerogative powers without doing something definitely unlawful.'

The right of the Crown to take the property of a subject without his consent can only be justified on the ground of necessity—*Salus reipublicae suprema lex*. The immediate question in the Case was whether the subject is entitled to compensation for interference with his proprietary rights, the necessity for that interference being assumed, rather than whether the right to requisition itself rests upon any legal foundation. The argument for the Crown was constructed on a broader basis. The right to requisition private property, it was contended, is a right to take without a corresponding obligation to pay. The right to take, use, or occupy is not enough: its exercise is not limited or conditioned by any such obligation. In order to test this asserted right, whether in its broader or in its narrower aspect, it becomes necessary to examine the authorities upon which the prerogative right is

founded, and the limitations set by law upon its exercise.

Inquiry, it is submitted, has established a practice on the part of the Crown, uniformly followed down to 1914, to compensate the subject where his property is taken for the public service, be it land, chattels, or ships.

The claim of the suppliants in the Case was to be compensated for the loss of a piece of land. It is obvious that the suppliants might endeavour to make good their claim by the use of a broader argument, which would apply to movables as well as to immovables. This broader argument would take the general form that when the Crown in an emergency compulsorily deprives a subject of property of any sort, there arises an obligation in the Crown on behalf of the whole community to compensate the individual who suffers this special loss, and this argument was employed in arguing the Case. But the suppliants had a narrower argument which was sufficient for the purpose in hand, namely that the taking of landed property is exhaustively covered by statutory enactment which secures compensation to the private owner; with the result that, at all events in the case of land, there was no room for the application of the alleged right of the Crown to take without payment. So far as land is concerned, the Case decides that the right to compensation now rests upon statute, and that the Crown cannot, by vouching the prerogative, take land for national defence while repudiating the obligation of payment imposed by statute.

In preparing to argue the case on the question of prerogative, it became necessary to investigate

the circumstances under which property generally was requisitioned in the past in order to ascertain whether the right claimed by the Crown could be said to exist at all; whether it still exists; the conditions of its exercise; and the principles upon which compensation was formerly paid. Except in so far as they relate to land these inquiries are, perhaps, not directly in point; if, however, they lead to the conclusion that the underlying principles are identical in all cases, not only is the case with regard to land fully established, but some contribution is made to the solution of similar questions arising out of the requisitioning of chattels and of ships.<sup>1</sup>

## II. *The Cases.*

### *The Case of Saltpetre.*

The argument for the Crown rested mainly upon two cases:

*The Case of Saltpetre*<sup>2</sup> is, like other cases to be found in Coke's Reports,<sup>3</sup> not a decision in any litigation, but a record of resolutions of the judges summoned in their consultative capacity as advisers of the Crown. The judges, having been summoned to consult what prerogative the King had in digging and taking up saltpetre to make gunpowder by the law of the Realm, resolved that the King may take saltpetre within the Realm subject to the following limitations:

1. Although the King cannot take trees of the subject growing upon his freehold and inheritance and although he cannot take gravel for reparation

<sup>1</sup> See Excursus I, p. 136 *post*.

<sup>2</sup> (1606) 12 Rep. 12; 77 E.R. 1294.

<sup>3</sup> See for example *The Case of Proclamations*, (1611) 12 Rep. 74; 77 E.R. 1352.

of his house, yet he may dig for saltpetre, but the ministers who dig for saltpetre are bound to leave the inheritance in as good a plight as they found it.

2. The case of gravel for the reparation of the King's houses is not to be compared, for the case of saltpetre extends to the defence of the whole Realm in which every subject hath benefit . . . *When enemies come against the Realm to the sea-coast, it is lawful to come upon my land adjoining to the same, to make trenches or bulwarks for the Defence of the Realm, for every subject hath benefit by it. And therefore by the Common Law every man may come upon my land for the Defence of the Realm, as appears 8 Edw. IV, 23. And in such Case on such extremity they may dig for gravel, for the making of bulwarks ; for this is for the public, and every one hath benefit by it ; but after the danger is over, the trenches and bulwarks ought to be removed so that the owner shall not have prejudice in his inheritance ; and for the commonwealth, a man shall suffer damage : as, for saving of a city or town, a house shall be plucked down if the next be on fire, and the suburbs of a city in time of war for the common safety shall be plucked down : and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 H. 8, fo. 15. And in this case the rule is true, Princeps et respublica ex iusta causa possunt rem meam auferre.*

*may of Crown  
public has  
power.*

3. This taking of saltpetre is a purveyance of it for the making of gunpowder for necessary defence and safety of the Realm and for this cause, as in other purveyances, it is an incident inseparable to the Crown, and cannot be granted demised or transferred, but ought to be taken only by the ministers of the King.

4. The ministers of the King cannot undermine weaken or impair the walls or foundations of any houses or other buildings and cannot dig in the floor of my mansion house which serves for the habitation



of man or in the floor of any barn employed for the safe custody of corn, hay, etc. But they may dig in the floors of stables, or ox-houses, so that there be sufficient room for horses and other cattle of the owner, and so that they repair it in convenient time, in so good a plight as it was before.

What bearing have these resolutions upon the questions in the Case? How far do they support the argument of the Crown? The question before the judges was the right of the 'ministers' of the Crown to enter land and to dig for saltpetre, that is to say, to enter land for making 'purveyance' of this necessary commodity.

The Crown relied strongly upon the passage in the second resolution which is printed in italics. To what does this amount? It is lawful to enter another man's land in case of invasion, but by what right? The reference to the right of every subject in like case to commit what would otherwise constitute a trespass makes it clear that this right is in no way to be ascribed to any prerogative of the Crown, but is merely that of every individual to make a temporary entry where such entry is justified by necessity, as in the case of a fire which threatens to spread to adjoining land or houses. This right is fully recognized in the Year Books<sup>1</sup>

<sup>1</sup> A custom in Kent 'when the enemy come to the coast' to enter upon land adjoining the same coast in defence and safeguard of the Realm and then to make there trenches and bulwarks for the Defence of the Realm—held to be well pleaded (Y. B. 8 Edw. IV, H. 41). An entry upon land in time of war 'pur faire bulwark in defence du Roy et le Realm'—held justifiable as a thing necessary for the commonwealth though otherwise illegal (Y. B. 21 Hen. VII, T. 27b). Suburbs 'd'cities seront plucked down in temps d'guerre: pur ceo que ceo est pur le commonwealth chescun poit faire sans aver action' (Y. B. 14 Hen. VIII, T. pl. 16).

and the Statute 4 Hen. VIII, c. i, to which reference has already been made,<sup>1</sup> was therefore declaratory of the Common Law, or at all events embodied a recognized principle, and perhaps regulated the conditions in which that right was to be exercised in a particular case.

‘The profitable prerogative of purveyance and pre-emption’, says Blackstone,<sup>2</sup> ‘was a right enjoyed by the Crown of buying up provisions and other necessaries, by the intervention of the king’s purveyors, for the use of his royal household, at an appraised valuation in preference to all others, and even without consent of the owner; and also of forcibly impressing the carriages and horses of the subject, to do the king’s business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative, which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In these early times the king’s household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use. And this answered all purposes in those ages of simplicity, so long as the king’s court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found necessary to send purveyors beforehand to get a sufficient quantity of provisions and other necessaries for the household; and, lest the unusual demand should raise them to an exorbitant price, the powers before-mentioned were vested in these

<sup>1</sup> *Ante*, p. 12.

<sup>2</sup> *Comm.* i. 287.

purveyors; who in process of time very greatly abused their authority and became a great oppression to the subject though of little advantage to the Crown.'

References to purveyance are to be found as early as Magna Carta of 1215, which forbids any constable or bailiff of the King to take corn or other provisions from any freeman without tendering money therefore, unless he can have postponement thereof by permission of the seller,<sup>1</sup> and further prohibits the taking by any sheriff or royal bailiff of horses or carts for transport duty without the consent of a free owner. These prohibitions were probably directed against requisitions by the King's officers in their own interest and placed no restrictions upon the practice for the legitimate purposes of the King's household,<sup>2</sup> with the result that the right of purveyance was grossly abused. The practice appears to have been universal throughout Europe.<sup>3</sup> Its early history in England is obscure; the accounts do not contain any allusions to the practice before the middle of the reign of Edward II.<sup>4</sup> Stubbs suggests<sup>5</sup> that the abuse may have been of comparatively late origin, or else that its early traces were submerged in the general oppression. However that may be, purveyance appears as a constant ground of complaint when men began to formulate their grievances in the shape of petitions by the Commons, upon many of which statutes were framed.

<sup>1</sup> Cap. 28, 30. Similar provisions are found in Magna Carta of 1225 (9 Hen. III), cap. 5, 19, 21.

<sup>2</sup> McKechnie, *Magna Carta*, p. 330.

<sup>3</sup> Stubbs, ii. 536.

<sup>4</sup> Thorold Rogers, *Hist. of Agriculture and Prices*, i. 117.

<sup>5</sup> ii. 536, quoting Archbishop Islip, *Speculum Regis*, c. 4.

The principal grievances were the taking of chattels without payment or only in exchange for exchequer tallies,<sup>1</sup> a vexatious anticipation of taxation since these could only be used in payment of Crown dues:<sup>2</sup> the corruption of the purveyors, who made requisitions in excess of what was required, and exacted payment for the release of the goods, and the arrogation to themselves by powerful subjects of a right which was possessed only by the King and to some extent by his family.<sup>3</sup>

Historical writers in dealing with the subject are apt to convey the impression that the exercise of this prerogative was confined to the taking of chattels for the personal use of the King and of his family, such as provisions for his house and horses and carriages for the conveyance of the King and of his retinue when on royal progress through the country, an impression which proves to be inaccurate upon a detailed examination of the statutes relating to purveyance. It is true that a number of these refer in terms only to the furnishing of the King's house and 'carriage', doubtless because they are directed to the grievances arising out of that particular form of purveyance; but there are occasional references to the garrisons of castles, while a statute of 1340 deals expressly with purveyance for the King's house and wars.<sup>4</sup> As early as 1275 the statute of Westminster the First<sup>5</sup> recites the evil of taking victual and other things to the King's use upon credence or for the garrison of a castle, and provides that the lands of those who having received payment from the exchequer or otherwise

<sup>1</sup> e. g. 3 Edw. I (1275), c. 32.

<sup>2</sup> McKechnie, p. 330.

<sup>3</sup> As in the case of Hugh Spencer; Thorold Rogers, *loc. cit.*

<sup>4</sup> 14 Edw. III, Stat. i, c. 19.

<sup>5</sup> 3 Edw. I, c. 32.

withhold it from the owners shall be liable to be taken in execution for the sums due and for damages, and that those who take horses or carriages for the King's use beyond what are needed shall be grievously punished by the Marshals (although no penalty is specified). In 1360<sup>1</sup> purveyance is declared to be properly confined to the use of the King, the Queen, and the King's eldest son, while by a statute of 1362<sup>2</sup> it is restricted to the King and Queen, and the 'heinous name' of purveyor is changed to that of buyer, while commissions to purveyors are to be issued under the great seal and renewed every half year. At a time when the King made war out of his own purse, with the help of such aids, prises, or other assistance<sup>3</sup> as he might be able to obtain, it is hardly surprising that the distinction between purveyance for his own personal use and for the purposes of war should appear somewhat faint. The statute of 1340,<sup>4</sup> however, makes it clear that the right of purveyance was exercisable for either purpose. It provides that purveyances made for the houses of the King and Queen, both where they live and where they pass through the country, shall be made by warrant ;

<sup>1</sup> 34 Edw. III, c. 2.

<sup>2</sup> 36 Edw. III, Stat. i, c. 2.

<sup>3</sup> A statute of 1297 (25 Edw. I, Stat. i, c. 5) recites that divers people are in fear that the aids and tasks they have given towards the King's wars and other business, of their own grant and goodwill, might turn to a bondage, and likewise for the prises taken by the King's ministers, and proceeds 'we have granted that we shall not draw such aids, tasks nor prises into a custom, and no such aids tasks or prises are to be taken in future except by the common assent of the Realm and for the profit thereof, saving the ancient aids and prises due and accustomed'.

<sup>4</sup> 14 Edw. III, Stat. i, c. 19.

and only by agreement with the vendors,<sup>1</sup> but that the 'great purveyances' (an expression which would seem to point to a distinction between supplies for the domestic use of the King and provision for his needs in time of war, such as carts, fish, and other victuals) for the King's wars and to victual his castles and towns in Scotland, England, and elsewhere shall be made by certain merchants and good people deputed by the Treasurer, but without commission from the King, provided that no one shall be forced to sell anything without his consent.

Once it is established that the Crown's right of purveyance covers both the right of the royal household to be provided with supplies for its own maintenance and the right of the King as the head of his people to get material for munitions of war, such as saltpetre, the inference that the requisition of chattels for national defence had the authority of the Common Law and was on a basis of payment to the subject becomes exceedingly clear. For no one suggests that the right of the King's household to take the provisions it needed was a right to take without payment—the controversy on this subject arises from the difficulty of making the King's officers pay what was constitutionally due—and if this is true of one sort of purveyance it seems difficult to believe that another application of the same right of purveyance did not lead to a similar constitutional right to be paid. Indeed, to the lawyers of the Middle Ages the two sorts of purveyance would have been indistinguishable. The

<sup>1</sup> This restriction, which is inconsistent with the exercise of the right of purveyance, is not re-enacted in the later statutes. See for example 34 Edw. III (1360), c. 2. 36 Edw. III, c. 2 (1362), provides that none need obey without ready payment.

King was the head of his people in peace and war, and he provided himself with supplies for his household and with munitions of war by virtue of the same title and in the exercise of the same function as head of the State. If, therefore, payment was due in one case, it was certainly due in the other.

The statutes had little if any effect in remedying these abuses, which formed the subject of a complaint in 1604. In that year the Commons presented a petition setting forth their grievances in respect of purveyance, in which it was asserted that the practice had been restrained by no less than 36 statutes. This, among other grievances, was referred to a Committee in whose proceedings Bacon took an active part. A conference with the Lords followed but the matter ultimately dropped.<sup>1</sup>

Two years later 'upon a grievous complaint' by the Commons 'concerning many grievances suffered in the execution of commissions granted to certain persons for getting saltpetre', the King replied that 'he had never an intention to make any application of his prerogative therein further than might stand with the lawful and necessary use thereof'.<sup>2</sup> All commissions and grants were thereupon revoked,<sup>3</sup> and the question of the limits within which the right might be lawfully exercised submitted for the opinion of all the judges, whose resolutions have been already referred to. Coke's report of the case mentions two commissions in the 31st year of Elizabeth, one of which, now in the Public Record Office, was included in the documents in the Case.<sup>4</sup> His statement that Elizabeth's commissions were

<sup>1</sup> Hallam, *Const. Hist.*, ed. 1884, i. 204.

<sup>2</sup> 3 Inst. 82.

<sup>3</sup> Ibid.

<sup>4</sup> App. E, p. 261.

the first of their kind is not entirely accurate.<sup>1</sup> The first document which has come to light is a warrant in 1492,<sup>2</sup> from Henry VII to one Stoke, Clerk of the Ordnance, authorizing him to provide so many houses, land, vessels, wood, coal, and other fuel suitable for making saltpetre for the Ordnance, 'the fee of the Church only excepted, for our moneys in this behalf reasonably to be paid' and to arrest<sup>3</sup> and take artificers, labourers, and workmen who are to 'serve us at our wages'. In 1415 Henry VIII having appointed one Wolf to be gunpowder maker within the Tower of London authorized him to dig for saltpetre wheresoever found and with such labourers as should be necessary to dig and labour, provided always that he first agree and then after to content and pay such persons where he and his labourers shall labour and break any ground truly and conveniently for the harm of such persons or their grounds.<sup>4</sup> A warrant<sup>5</sup> of the 31st year of Elizabeth to Evelyn and others (doubtless one of the two licences referred to in the *Case of Saltpetre*)

<sup>1</sup> With regard to Coke's accuracy, Sir F. Pollock, in a note to *R. v. Casement* (1917) 1 K.B., p. 141, points out that his authority as to the law as understood in his own time must be distinguished from his opinions in historical and antiquarian matters.

<sup>2</sup> Patent Roll, 5 Hen. VII, m. 28 d (8 d) (Record Office).

<sup>3</sup> The extension of purveyance to the impressment of labour is common throughout the Middle Ages. Hallam (*Middle Ages*, ed. 1878), iii. 149, cites a commission (Rymer, *Foedera*, vi. 417) from Edward III to William of Walsingham empowering him to collect as many painters as might suffice for 'our works in St. Stephen's Chapel at Westminster'. Hallam adds that Windsor owes its massive magnificence to labourers impressed from every part of the Kingdom. It is to be observed that the commissions for the taking of saltpetre provide that all labourers be paid.

<sup>4</sup> State Papers Dom., x, no. 79.

<sup>5</sup> App. E, p. 261.



directs that letters patent be issued to the grantees which, after reciting the Prerogative Royal, direct petre or powder makers to make good all damage, and that any 'variance' with owners of land be referred to two justices of the peace. All persons assisting are to be paid their reasonable charges, and carriages are to be paid for at the fixed rate of fourpence the mile. Similar but more elaborate provisions are contained in a warrant of 41 Elizabeth<sup>1</sup> directing letters patent to be issued to the same grantees for a term of eleven years, the grantees being required at their own proper costs and charges to make up and repair every place 'broken, stirred, digged, or in any sorte decayed hindered or defaced', and the letters patent conclude with a comprehensive clause, 'Notwithstanding any statute, Act of Parliament, order, proclamation, ordinance, law, usage, custom, or other matter whatsoever to the contrary.' A warrant was also issued containing the form of Indenture to be made with the grantees which incorporates similar provisions.<sup>2</sup>

An illustration of the manner of making purveyance of saltpetre after the resolutions of the Judges in 1606 is to be found in a warrant of Charles I, 1629,<sup>3</sup> when, as the warrant recites, there was 'more than ordinary occasion to provide good and sufficient saltpetre and powder to furnish stores for the defence and safety of the realm'. At this time England was actually at war with Spain (the war with France was concluded in April by the peace of Susa). After reciting the Royal Prerogative, power is given to enter, break open,

<sup>1</sup> (1599) App. E, p. 263.

<sup>2</sup> Chancery Warrants, series ii, file 1636 (Record Office).

<sup>3</sup> App. E, p. 272.

and work for saltpetre as well within the houses, lands, grounds, or possessions of the King, his heirs and successors as well as within those of his subjects. The warrant<sup>1</sup> then makes full provision for payment of compensation by 'paying to owners or present possessors of such houses, barns, stables, yards, and outhouses, reasonable rents and rates for the time they shall be used for our service'. And if such owners or possessors 'shall be obstinate and unreasonable in their demands', compensation is to be assessed by the mayors in boroughs and two justices in rural places.

Purveyance, then, was a right of pre-emption, exercisable on definite conditions. A purveyor required the authority of a warrant or commission, and must pay a fair price or compensation for chattels, and for transport, and these conditions apply equally in peace and in war.

Purveyance was finally abolished in 1660 at the Restoration by an 'act for taking away the Court of Wards and Liveries and tenures in capite and by Knight's service and purveyance, and for settling a revenue on his Majesty in lieu thereof'.<sup>2</sup> The

<sup>1</sup> It appears from the warrant of 1599 that the grant constituted a monopoly. Three years later the illegality of monopolies was affirmed in the Case of Monopolies (11 Rep. 846). The warrant of 1629 (the Statute of Monopolies (21 Jac. I, c. 3) had been passed in 1623) does not purport to grant any exclusive right. An Act of 1640 (16 Car. I, c. 21), after reciting that the importation of gunpowder has been of late times prohibited, gives liberty to all persons to import it and also saltpetre. In 1685 the importation of gunpowder was prohibited except by licence (1 Jac. II, c. 8). There appear to be no documents of record referring to saltpetre after 1665, or thereabouts, as the substance was then obtained in increased quantities from India.

<sup>2</sup> 12 Car. II, c. 24, s. 11.

Act marks the end of the feudal system of providing supply, founded mainly on tenure and other feudal institutions, for which it substitutes the modern constitutional practice of regular taxation granted by Parliament.

At this point the statutory history of Purveyance as such comes to an end. The subsequent history of the right to impress chattels and transport is dealt with hereafter.<sup>1</sup>

### *The Case of Ship-money.*

*R. v. Hampden*,<sup>2</sup> the celebrated case of ship-money, occupies a wider field and indeed forms an almost inexhaustible storehouse for the study of questions connected with the prerogative of the Crown in time of war. It will be desirable to give a short account of the case in order to recall as succinctly as possible the circumstances in which it came to be argued, and to make clear the precise relevance of the citations from the judgments and arguments upon which reliance was placed in the Case.

That ships were in fact requisitioned by the Crown for the public service throughout the Middle Ages admits of no doubt,<sup>3</sup> and instances of the requisitioning of ships had occurred as recently as 1626 during the war with Spain.<sup>4</sup> Professor Holdsworth<sup>5</sup> cites instances in which in the Tudor

<sup>1</sup> p. 139, *post*.

<sup>2</sup> (1637) 3 How. St. Tr. 826. The report incorporates a number of documents printed in Rushworth's *Historical Collections*, which are the most authentic source of information.

<sup>3</sup> See p. 148, *post*.

<sup>4</sup> Gardner, vi. 132.

<sup>5</sup> See the learned article on 'The power of the Crown to requisition British ships in a national emergency', *L. Q. R.*, xxxv. 12.

period the seaport towns and maritime districts had found the expense of furnishing their contingent of ships burdensome and had attempted to obtain contributions from the neighbouring districts. In 1619 the ports were assessed not in terms of ships, but in money. The decision to adopt the expedient of levying money instead of contributing ships was made in 1634 on the suggestion of Noy, the Attorney-General, a plan which if successful had the obvious advantage from the point of view of Charles I of relieving him of the necessity of summoning Parliament.<sup>1</sup> The first writs, issued in 1634, were confined to the maritime counties and were followed in 1635 by a second series of writs which laid the whole country under contribution. In the face of the opposition which was aroused,<sup>2</sup> it was decided to obtain an opinion of the Judges before the legality of the writs could be tested in the Courts at the instance of a subject.<sup>3</sup> Accordingly Coventry, the Lord Keeper, delivered to the Judges a letter enclosing a Case which propounded the questions 'when the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger; Whether may not the King by writ under the Great Seal of England, command all the subjects

<sup>1</sup> Gardner, vii. 356.

<sup>2</sup> Particularly in the City of London and in Oxfordshire. Gardner, vii. 102.

<sup>3</sup> In 1636 one Richard Chambers, merchant, commenced an action for trespass and false imprisonment against Sir Edward Bromfield, who had imprisoned him for refusing to pay ship-money during Bromfield's mayoralty of the City of London; Knight, J., refused to allow the case to be proceeded with on the ground that 'many things which might not be done by the rule of law might be done by the rule of government', Rushworth, pt. ii, vol. i, p. 323.

of this kingdom, at their charge, to furnish and provide such number of ships, with men, victuals, and munition and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof, in case of refusal or refractoriness? And whether, in such a case, is not the king sole judge, both of the danger, and when and how the same is to be prevented and avoided?'<sup>1</sup> These questions the judges unanimously answered in the affirmative. 'If these men', says Clarendon, 'had preserved the simplicity of their ancestors in severely and strictly defending the laws, other men had observed the modesty of theirs, in humbly and dutifully obeying them.'

The form of the questions is not without importance. The principal question assumes the danger of which, by the second question, the Judges are invited to declare the King to be the sole Judge.

Thereupon, on October 9, 1637, the third writ was issued. It was no longer possible to regard ship-money as a temporary burden to meet a specific emergency: it was evidently intended to remain as a permanent tax upon the nation.<sup>2</sup> An assessment of forty shillings having been made upon John Hampden which he, in common with others in the county of Buckingham, declined to pay,<sup>3</sup>

<sup>1</sup> 3 St. Tr. 844. Coventry's speech to the Judges is at p. 839. 'The Lord Keeper Coventry approved and assisted the project as far as his learning in these matters did extend, and that was not far,' Oldmixon.

<sup>2</sup> 'For a spring and magazine that should have no bottom and for an everlasting supply of all occasions,' Clarendon.

<sup>3</sup> A facsimile of the return made by the Assessors in the parish of Great Kimble is printed in Nugent's *Memorials of Hampden*. The assessors and constables who signed the return

proceedings were taken against him in the Exchequer whereto he demurred as being insufficient in law. The same judges by a majority of one decided in favour of the legality of the writ, and ship-money continued to be levied (although in decreasing amounts) until 1640 when by 'An Act<sup>1</sup> for declaring unlawful and void the late proceedings against ship-money and for the vacating of all records and process concerning the same' it was declared and enacted 'that the said charge imposed upon the Subject, for the providing and furnishing of Ships, commonly called Ship-Money, and the said extra judicial Opinion of the said Judges and Barons, and the said Writs, and every of them, and the said Agreement or Opinion of the greater part of the said Justices and Barons, and the said Judgment given against the said John Hampden, were and are contrary to and against the laws and Statutes of this Realm, the Right of Property, the Liberty of the Subjects, former Resolutions in Parliament, and the Petition of Right made in the third Yeare of the Reign of his Majesty that now is.'

In these circumstances, for what proposition is the *Case of Ship-money* an authority? The Act of 1640 recites the main grounds upon which the

had the good taste to include their own names in the list of those returned as refusing to pay. The amount of Hampden's assessment was 31s. 6d. The assessment of 20s. upon which the proceedings were founded was in respect of lands in the neighbouring parish of Stoke Mandeville. The sum immediately in question was therefore assessed only on a portion of Hampden's lands (Hallam, ii. 17). For the amounts fixed during the reign of Charles I, the application of the moneys, and the method of assessment and collection, see *Royal Hist. Soc. Transactions*, 3rd series, iv. 141; Hallam, ii. 17.

<sup>1</sup> 16 Car. I, c. 14.

majority of the Judges gave their decision. They are thus formulated: 'that when the good and safety of the Kingdom in general is concerned and the whole Kingdom in danger, the King might by Writ under the Great Seal of England command all the subjects of this his Kingdom, at their Charge, to provide and furnish such Number of Ships with Men, Victuals, and Munition, and for such time as the King should think fit, for the Defence and Safeguard of the Kingdom from such Danger and Peril, and that by Law the King might compel the doing thereof in case of Refusal or Refractoriness; and that the King is the sole Judge, both of the Danger and when and how the same is to be prevented and avoided.'

The case therefore turned not on the legality of the prerogative to requisition ships but on the legality of the right to levy ship-money.

The argument on behalf of Hampden was entrusted to Oliver St. John<sup>1</sup> and Robert Holborne. St. John's argument, apart from its great learning, is remarkable for the skill with which he made admissions which did not impair the force of his case, in order to smooth the way for Judges who had already in their extra-judicial opinion expressed themselves adversely to his principal contention. Thus he made no distinction between the levy of ship-money in the inland as compared with the maritime counties. In dealing with the question whether the King was the sole judge of necessity

<sup>1</sup> Lord Campbell, whose appreciation of St. John is far from sympathetic, characterizes it as the finest that had ever been delivered in Westminster Hall (*Lives of the Chief Justices*, i. 453). 'He had not been taken notice of in Westminster Hall till he argued the case of shipmoney' (Clarendon).

he made the admission upon which reliance was placed by the Crown in the Case.

‘The law,’ he admits,<sup>1</sup> ‘hath made his Majesty sole judge of dangers from foreigners, and when and how the same are to be prevented; and to come nearer, hath given him power by Writ under the great seal of England to command the inhabitants of each county to provide shipping for the Defence of the kingdom, and may by law compel the doing thereof.’

How does this admission bear upon the argument in the Case? It is an admission by counsel made, perhaps unnecessarily, in order not to put his case higher than was requisite in order to establish his proposition. ‘Admissions made in such a case do not constitute precedents, and the arguments applicable to the Royal Prerogative before the revolutionary period must be read subject to the restrictions which have been subsequently imposed.’<sup>2</sup> St. John proceeds to show that the necessity being once admitted, it must be met by constitutional means, when such means are available, that is to say by recourse to Parliament. In other words even admitting that the ordinary means had been all used, but proved insufficient, the Crown cannot, without the consent of Parliament, ‘alter the property of the subject’s goods’.<sup>3</sup> The Crown can obtain supplies from Parliament, for ‘the law hath foreseen and provides the supplies accordingly without the way of the writ’.<sup>4</sup> The danger, it is true, may be such as to justify the taking of the subject’s goods without his consent, but that can only be *tempore belli*—and *tempus belli* when property

<sup>1</sup> 3 St. Tr. 862.

<sup>2</sup> Per Lord Parmoor, App. A, p. 210.

<sup>3</sup> 3 St. Tr. 881.

<sup>4</sup> Ibid., 877.



ceaseth 'is not upon every intestine or defensive war, but only at such times when the course of justice is stopped, and the Courts of Justice shut up'<sup>1</sup> and for this limited or technical meaning of the expression 'in time of war' he cites authorities.<sup>2</sup>

Holborne in his argument goes farther. Having first denied the danger, which the writ did not refer to as imminent, he proceeds to consider what constitutes actual danger. 'If there be an actual war, the subject may, without any direction do any act upon any man's land and invade any property towards defence: it is the law of necessity that doth it.'<sup>3</sup> But the King cannot charge the subject out of Parliament and, so long as the resort to Parliament is open, the King cannot act under extraordinary powers.<sup>4</sup>

Of the judgments, it is only necessary to refer to those of Sir George Crooke and of Sir Richard Hutton, both of whom had been parties to the original resolution in favour of the legality of ship-money and who now, together with Sir John Denham, Sir Humphrey Davenport, and Sir John Bramston, formed the minority.<sup>5</sup> Crooke admits that there may exist cases 'in which course may be taken for defence till a Parliament be had'<sup>6</sup> and holds that 'royal power is to be used in cases of necessity and imminent danger when ordinary courses will not avail, for it is a rule *Non occurrendum est ad extraordinaria quando fieri potest per ordinaria*.<sup>7</sup>

<sup>1</sup> 3 St. Tr. 903.

<sup>2</sup> Ibid. 904.

<sup>3</sup> Ibid. 975.

<sup>4</sup> Ibid. 971.

<sup>5</sup> For the subsequent proceedings in Parliament and the impeachment of the judges who formed the majority, see 3 St. Tr. 1254.

<sup>6</sup> Ibid. 1135.

<sup>7</sup> Ibid. 1162.

He then proceeds to show that the writ imposed taxation, and that no such emergency had arisen as would justify the course adopted. 'If there be time to make ships, or prepare ships at the charge of the counties, then is there time enough for his Majesty, if he pleases to call his parliament, to charge his commons, by consent in Parliament, and to have a subsidiary aid, as always hath been done in such cases. And they are not so long coming or meeting, but they will make provision for defence, it being for all their safeties.'<sup>1</sup>

Sir Richard Hutton bases his judgment on the absence of any necessity which would justify the imposition of a tax. The former opinion of the Judges was based on the assumption that there was imminent danger. 'I do agree in time of war<sup>2</sup> when there is an enemy in the field, the King may take goods from the subject; such a danger, and such a necessity, ought to be in this case, as in case of a fire like to consume all without help, such a danger as tends to the overthrow of the Kingdom.'<sup>3</sup> But there being here no such imminent necessity (and it was not even recited in the writ, the words *quod salus regni periclitabatur* having been subsequently inserted in the *mittimus*)<sup>4</sup> the law cannot compel subjects to part with their interest in their goods.

Another passage from Hutton's judgment was cited by Avory, J., in *In re a Petition of Right*.<sup>5</sup>

<sup>1</sup> 3 How. St. Tr. 1159.

<sup>2</sup> Doubtless the phrase is used in the technical sense in which St. John employed it.

<sup>3</sup> 3 St. Tr. 1198.

<sup>4</sup> Ibid. 1199.

<sup>5</sup> (1915) 3 K.B. at p. 652. See further as to this case p. 69, *post*.

‘There are some inseparable prerogatives belonging to the Crown such as the Parliament cannot sever from it. . . . Such is the case for the defence of the Kingdom, which belongeth inseparably to the Crown as head and supreme protector of the Kingdom.’<sup>1</sup> This passage is but a faint echo of the pretensions to absolute power advanced by the supporters of the Royal Prerogative in Stuart times, of which numerous examples might be cited from the judgments of the majority of the Court in the ship-money case. Berkley for example, says<sup>2</sup>: ‘The law knows no such King-yoking policy. The law is of itself an old and trusty servant of the King’s, it is his instrument or means which he useth to govern his people by. I never heard nor read that *Lex* was *Rex*, but it is common and most true that *Rex* is *Lex*, for he is “*Lex loquens*” a living, a speaking, an acting law.’ Finch says<sup>3</sup>: ‘Acts of Parliament to take away (the King’s) royal power in the defence of his Kingdom are void . . . for no Acts of Parliament make any difference.’

Language such as this affords interesting illustrations of the attitude of mind which prevailed among sixteenth-century lawyers with regard to the Royal Prerogative. It cannot be suggested as applicable to any legitimate exercise of prerogative powers at the present day.<sup>4</sup>

<sup>1</sup> 3 How. St. Tr. 1194.

<sup>2</sup> Ibid. 1098.

<sup>3</sup> Ibid. 1235.

<sup>4</sup> See the passage from the judgment of Lord Parmoor, cited p. 64, *ante*.

## III

How do the principles to be deduced from the *Case of Saltpetre* and the *Case of Ship-money* assist the determination of the questions arising in the *Case of Requisitions*<sup>1</sup>? It is scarcely permissible to suggest any close analogy upon the facts. The *Case of Saltpetre* deals with purveyance

<sup>1</sup> A few cases were cited in argument which contain general expressions—in each case entirely *obiter*—upon which reliance was placed on behalf of the Crown. In *Maleverer v. Spinke* (1537) 1 Dyer 36; 73 E.R. 81 (an action for waste, decided on demurrer on a point of pleading) it is said ‘In time of war a man may justify making fortifications on another man’s land without licence’. In *Hole v. Barlow* (1858) 4 C.B. (N.S.), p. 345; 140 E.R., p. 1118, Willes, J., says ‘Every man has a right to the enjoyment of his land, but in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation.’ The action was for a nuisance from burning bricks. The point decided viz. the proper direction to a jury, was overruled in *Bamford v. Turley* (1862) 3 B. & C. 73; 122 E.R. 29; and in *Shott’s Iron Co. v. Inglis* (1882) 7 A.C. 518. In *British Cast Plate Manufacturers v. Meredith* (1792) 4 T.R. 794; 100 E.R. 1306, Buller, J., says ‘there are many cases in which individuals sustain an injury, for which the law gives no action; for instance pulling down houses, or raising bulwarks, for the preservation and defence of the Kingdom against the King’s enemies. The Civil Law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction; but no one ever thought that the Common Law gave an action against the individual who pulled down the house.’ See also *Bac. Abr. Tit. Prerog.* (7th ed.), vi. 434. ‘The King in consequence of his power in making war and peace hath a prerogative in the coin and Royal mines, in saltpetre and gunpowder; may enter into a man’s land to make fortifications (1 Roll. R. 152) . . . and though in many instances relating to these matters the strict letter of the law may be exceeded, yet from the necessity of order, government and discipline are they countenanced and allowed: *quod necessitas cogit defendit.*’

of chattels, to which the right to enter land—subject to considerable restrictions—is merely incidental. The *Case of Ship-money* negatives the right of the Crown to impose a money charge without the consent of Parliament. The judicial opinions upon which reliance was placed in the arguments of the Crown in the Case assert a right inherent, not in the Crown in virtue of any prerogative, but in every subject in the common interest, to enter upon lands for the purpose of defence in the event of invasion, and embody a proposition fully covered by ancient authority.<sup>1</sup> They assume an emergency which would render the ordinary procedure for obtaining parliamentary sanction entirely nugatory and inadequate. No such emergency was suggested to have arisen in the circumstances of the Case: if it had existed, sufficient provision had been made under Parliamentary authority to meet it.<sup>2</sup>

The *Case of Saltpetre* and the *Case of Ship-money* were recently discussed *In re a Petition of Right*,<sup>3</sup> the decision of which in favour of the Crown by Mr. Justice Avory and by the Court of Appeal was mainly based upon the passages in the old cases which have been referred to and discussed in this chapter. The researches at the Public Record Office had not been made when this case was argued. The Master of the Rolls distinguished the present Case for the reason that in *In re a Petition of Right*<sup>3</sup> the ground was actually required for the purposes of hostilities in the air and was analogous to the erection of bulwarks against invasion. It therefore had no application to the taking of possession of lands and buildings for administrative purposes.<sup>4</sup>

<sup>1</sup> See p. 49, *ante*, note 1.

<sup>2</sup> *Ante*, p. 39.

<sup>3</sup> (1915) 3 K.B. 649.

<sup>4</sup> (1919) 2 Ch. p. 229.

*In re a Petition of Right* was taken on appeal to the House of Lords when the appeal was withdrawn on the terms of the Crown agreeing to pay compensation.<sup>1</sup> The decision of the Court of Appeal in that case, although not expressly overruled in any judgment delivered in the Case, cannot now be considered as binding. Lord Sumner,<sup>2</sup> while regarding it as an exemplification of the ancient rule traced back in the Year Books<sup>3</sup> that both King and subject may enter land for the purpose of raising bulwarks, points out that the case was decided, rightly or wrongly, upon this analogy. Lord Dunedin<sup>4</sup> goes farther. He was satisfied upon the evidence that the custom of payment in former times was established, and expressed the opinion that *In re a Petition of Right* and the Case cannot be distinguished in essential particulars.

One other recent decision which was discussed requires mention. The opinion of Lord Parker in *The Zamora*<sup>5</sup> contains a statement that 'the municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown'.<sup>6</sup> If this statement is to be taken as a considered opinion, founded on the examination of the authorities (the documentary

<sup>1</sup> See p. 5, *ante*, note 2.

<sup>2</sup> App. A, p. 205.

<sup>3</sup> See p. 49, *ante*, note 1.

<sup>4</sup> App. A, p. 171.

<sup>5</sup> (1916) 2 A.C. 77.

<sup>6</sup> Observations made by judges in the course of an argument ought not, of course, to be cited as representing a considered opinion. It may, however, be permissible to state that during the argument in *In re a Petition of Right* in the House of Lords, Lord Parker appears to have used expressions which seem to indicate that he did not regard it as by any means clear that where a requisition was lawfully made the subject had no legal right to compensation.

evidence produced in the Case had not at that time been examined) and intended to formulate any proposition upon the right of the subject to compensation according to the law of England, it must of course be regarded as directly in point. But the passage occurs in an opinion of the Privy Council on an appeal from the Prize Court, the question being whether it was consistent with the law of nations that a Court of Prize should release to the Crown, against deposit of the value in Court, the property of a neutral held in its custody pending adjudication, whenever the Crown duly declares that a requisition was necessary for the defence of the Realm. The rule of the law of nations that a requisition is lawful, subject to payment of the appraised value of ship or cargo, was affirmed, in favour of a neutral, on the ground that such a requisition imposed no greater burden on neutral than on British subjects.

The passage referred to therefore merely embodies an assumption upon which, if it be justified, the requisition of neutral property subject to payment of compensation constitutes an interference the burden of which is not greater, and may conceivably be less, than must be borne by a British subject in the event of his property being required for purposes of defence.<sup>1</sup> The Royal Prerogative which was in issue was the right according to the law of nations to requisition vessels or goods in the custody of the Prize Court of a belligerent power. The reference to the prerogative in the domain of English municipal law was therefore merely incidental and was not in issue in the proceedings.<sup>2</sup>

<sup>1</sup> Per Lord Sumner, App. A, p. 205.

<sup>2</sup> Per Lord Parmoor, App. A, p. 212. The right in question in *The Zamora* is, of course, closely analogous to the right of

Upon the authorities it is accordingly submitted that the Crown has no right by virtue of any prerogative to enter the land of the subject without consent and that where an entry in the case of an instant danger is lawful, it is justified, not under any such prerogative but in accordance with the right common both to the Crown and to its subjects, to take what steps are necessary\*at the moment to meet the emergency. The element of time is, therefore, all-important, and it is only in circumstances in which recourse to Parliament in order to obtain powers over and above those which are recognized by law as being vested in the Crown will involve such delay as would imperil the national defence that it can be said that 'the King is the sole judge of the danger'. For the judgment of the King, modern constitutional practice has substituted the discretionary power of the Executive. The extent to which that discretion is subject to the control of the Courts will be dealt with hereafter.<sup>1</sup>

#### IV. *The Historical Evidence.*

The time covered by the documents relating to land which were considered in the Case falls naturally into three periods. Firstly, before the statute of Anne of 1708, secondly from 1708 to the first general

angary which is recognized by the law of nations. The authorities upon this right are collected in the report of the argument in *The Zamora* in the Prize Court (1916), P. 30. For a recent instance in which the right was recognized in the English Courts, see *Commercial and Estates Company of Egypt v. Ball* (1920) 36 T.L.R. 526.

<sup>1</sup> pp. 82, 94, *post*.



Defence Act of 1798, and thirdly the period subsequent to 1798.

In the first period the following are typical instances. The warrant of Charles I in 1629<sup>1</sup> authorizing the entry upon land for the purpose of obtaining saltpetre, subject to the payment of rent, has already been referred to.<sup>2</sup> Instances in which powder mills were ordered to be impressed occur in 1664.<sup>3</sup>

An Ordnance Minute of 1664<sup>4</sup> suggests that a jury be summoned if the proprietors of ground at Portsmouth persist in their unreasonable demands. At this time war with Holland was imminent, acts of war having occurred throughout the year, followed on March 4, 1665, by the formal outbreak of the first Dutch war. During the interval of peace between the first and second Dutch wars payments are recorded (in 1668) for the rent of ground for a battery,<sup>5</sup> and for damage done by proving a mortar piece.<sup>6</sup> In the same year instructions were given to contract for and buy ground for batteries at Chatham 'for the cheapest rates you or they can agree'.<sup>7</sup> In

<sup>1</sup> App. E, p. 272.

<sup>2</sup> p. 57, *ante*.

<sup>3</sup> App. F, pp. 277, 278. The popular association of the word 'impressment' with the notion of not paying is fallacious. The word 'imprest' is derived from *impraestare* (Fr. *prêter*) and is applied to money advanced for a particular purpose. So 'Imprest money' was the sum advanced to soldiers upon enlistment. The expression 'to imprest unto' in the document printed in App. F, p. 281, is therefore the equivalent of 'authorized by warrant'. So an Act 13 Eliz., c. 4, refers to 'Receivers of any sum of money imprest, or otherwise for the use of the Queen's Majesty'. In the National Debt Act, 1870 (33 & 34 Vict., c. 71, s. 44) money issued for the payment of dividends is to be paid to the chief cashier of the bank by way of imprest.

<sup>4</sup> App. F, p. 279.

<sup>5</sup> *Ibid.*, p. 285.

<sup>6</sup> *Ibid.*, p. 285.

<sup>7</sup> *Ibid.*, p. 282.

1674, shortly after the end of the second Dutch war, the storekeeper at Portsmouth is directed to ascertain what storerooms may be hired :<sup>1</sup> similar directions are given with regard to Hull in 1682.<sup>2</sup> In 1681 directions are given to ascertain what statutes there are for making fortifications.<sup>3</sup> In 1705, the year of the siege of Namur, immortalized in English literature by Sterne, compensation was given for the destruction of houses on Tower Wharf.<sup>4</sup>

The second period is marked by the long succession of local but permanent acts following that of 1708, the method of carrying out of which has already been referred to.<sup>5</sup> A minute of February 1718 (war with France broke out later in the same year) records that an owner who is willing to sell has a tenant who is making exorbitant demands, and instructs the storekeeper at Plymouth to endeavour to come to an agreement.<sup>6</sup> A number of receipts for rent<sup>7</sup> are extant in respect of land on Hilsea Common (which was included in the Act of 1757<sup>8</sup> relating to Portsmouth), the amount paid in some cases including compensation for damage. In other cases attention is called to the necessity of obtaining an Act of Parliament : as in 1719 during the war with Spain.<sup>9</sup> The difficulty in this instance appears to have been due to the fact that necessary parties were under disability. This is just such a case as would call for the exercise of powers under the prerogative if it existed. In point of fact in a similar

<sup>1</sup> App. F, p. 285.

<sup>2</sup> Ibid., p. 285.

<sup>3</sup> Ibid., p. 284.

<sup>4</sup> Ibid., p. 287.

<sup>5</sup> *Ante* p. 20.

<sup>6</sup> App. F., p. 288.

<sup>7</sup> Ibid., p. 288.

<sup>8</sup> 31 Geo. II, c. 39, *ante*, p. 17.

<sup>9</sup> App. F, p. 288.

case in 1804<sup>1</sup> possession was directed to be taken under the Defence Act, another instance of resort to legislation to solve a difficulty which, if Common Law powers had sufficed, need not have arisen. A case in which rent was paid for temporary barracks occurs in 1775 during the American War.<sup>2</sup>

The principal feature of the documents during the third period is the constant reference to the Defence Acts as affording the means for obtaining possession. One instance in 1804 has just been referred to.<sup>3</sup>

A further illustration is afforded by protracted negotiations which took place in 1805 in connexion with the Cheshunt Water which the Board of Ordnance had actually purchased, the object being to lead it to the Royal powder mills at Waltham Abbey. The story begins with a letter dated August 4, 1805,<sup>4</sup> from the Comptroller of the Mills to the Board of Ordnance calling attention to 'the great demand which will soon be made for gunpowder to replace what has been expended in the late actions'. The reference is obviously to the naval operations which were then in progress.<sup>5</sup> These demands make the Comptroller 'very anxious for the Ordnance to avail themselves of the Cheshunt Water they have purchased'. On August 17,<sup>6</sup> the Comptroller is suggesting an application to the Government to empower the Ordnance to take possession of the Water 'for as long a time as the

<sup>1</sup> Ibid., p. 290.

<sup>2</sup> Ibid., p. 289.

<sup>3</sup> Ibid., p. 290.

<sup>4</sup> Ibid., p. 290.

<sup>5</sup> Sir Robert Calder's indecisive encounter with Villeneuve had taken place on July 22.

<sup>6</sup> App. F, p. 291.

Service may require it'—a phrase which is borrowed from the Defence Act of 1804—allowing a reasonable compensation to the proprietors of the corn mills at Cheshunt and at Waltham Abbey. It is then suggested that 'the exigency of the public service renders it indispensable' to authorize the mills at Cheshunt to be taken possession of under the Defence Act, which will be attended with the further advantage of removing some legal obstacles arising from a claim of the poor of the neighbourhood to have their corn ground at the mills. The Board of Ordnance approves the suggestion.<sup>1</sup> Protracted negotiations followed with the freeholder of the mills and with his tenants, whose attitude reflects little credit upon their patriotism. Possession was in fact taken under the Defence Act.<sup>2</sup> on September 29, less than a month before the battle of Trafalgar. The legal significance of this incident in one of the gravest crises of our history cannot possibly be exaggerated and calls for no comment, except that it is difficult to imagine a more appropriate case for the use of the prerogative power of the Crown, if such powers were available.

An instance<sup>3</sup> occurs in which compensation was given in 1813 in respect of damage done by stopping up gateways by which farmers in the Isle of Thanet drew up seaweed in order to obtain

<sup>1</sup> App. F, p. 291.

<sup>2</sup> Terms were ultimately agreed for the sale of the freehold, but the tenants' demands were considerably in excess of what the authorities were willing to pay. The offer of the Crown to submit the question of compensation to arbitration having been refused, the value of the lessees' interest was ultimately (apparently not until May 1808) assessed by a jury (App. F, p. 292).

<sup>3</sup> App. F, p. 293.

manure for their lands. The gateways had been stopped up in 1804 when an invasion was anticipated. Money payments were ordered in the case of each complainant and a recommendation is recorded for the re-opening of one if not more of the gateways.

Finally an undated document<sup>1</sup> from the Earl of Chatham's papers (endorsed September 1819) would seem to refer to a period before the passing of the Defence Act of 1804. It records the case of an owner who is willing to grant a lease of his land for the duration of the war, but who declines to sell, and it is suggested that it will be necessary to introduce a Bill in Parliament to empower the Board of Ordnance to purchase the property.

It remains to consider the conclusions to be drawn from these documents. No instance has come to light in which a Petition of Right has been presented or filed in support of a claim to compensation, a fact upon which the Crown relied as inconsistent with the existence of any basis in law for any such claim, no subject having ever had the temerity to put forward such a contention.<sup>2</sup> On the other hand the Suppliants argued that the fact that payments were regularly made, coupled with a complete absence of instances of refusal or of payment expressed to have been made *ex gratia*, show that the subject never had occasion to resort to litigation—the Crown always paid. As regards land, then, there was a universal practice of payment resting on bargain before 1708 and on statutory power and provision after that date. Lord Dunedin<sup>3</sup> declines to infer a customary obligation

<sup>1</sup> App. F, p. 295.

<sup>2</sup> Per Lord Sumner, App. A, p. 204.

<sup>3</sup> App. A, p. 171.

to pay 'for once the taking itself is admitted to be as of right, the usage of payment is equally consistent with a payment *ex lege* and a payment *ex gratia*'. But he finds an admitted custom to pay, in the face of which it is not surprising that there should be consent on the part of the Crown that this branch of the prerogative should be regulated by statute.<sup>1</sup>

The conclusion, then, is that 'it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative'.<sup>2</sup> It is submitted, therefore, that the alleged prerogative is not established by the evidence, and that the subject has a constitutional right to the enjoyment of his land, while the Crown is under a corresponding obligation to pay compensation where in case of emergency that right is affected.<sup>3</sup>

<sup>1</sup> App. A, p. 171.

<sup>2</sup> Per Lord Atkinson, App. A, p. 183.

<sup>3</sup> The onus of proof would as between subjects be upon the party alleging the right, and it is submitted that the Crown is in no better position. 'It is for the officers of the Crown to make out clearly the Prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation' (*Attorney-General to Prince of Wales v. Crossman* (1866) L.R. 1 Ex. 386). The prerogative with regard to procedure is expressly preserved by section 34 of the Defence Act, 1842. There appears to be no decision which affects the ordinary rules as to the burden of proof, but in the light of the cases cited in Robertson, *Civil Proceedings against the Crown*, p. 595, the proposition that the onus of proof is on the Crown may be open to some doubt.

## CHAPTER IV

### THE DEFENCE OF THE REALM CONSOLIDATION ACT, 1914

#### I

THE officers of the Crown purported to take possession under statutory powers conferred by the Defence of the Realm Consolidation Act, 1914.<sup>1</sup> Briefly, the contention advanced on behalf of the Crown was that upon the proper construction of the Act and Regulations the competent military authority was authorized to take possession of land while the subject had no legal right to compensation.

Whatever rights to compensation the Suppliants might have had under the general law as it stood in August 1914, those rights, it was argued, were taken away by the authority conferred by the Defence of the Realm Consolidation Act, 1914<sup>1</sup> to make regulations for the suspension of any restrictions on the acquisition and user of land under the Defence Acts 1842 to 1875.<sup>2</sup> The argument, therefore, was that the liability of the Crown to compensate the subject for land taken for purposes of national defence was a 'restriction' of which Parliament authorized the suspension by the Regulation referred to. The answer to this contention was twofold.

In the first place, the liability to make compensation when land is taken for purposes of defence is

<sup>1</sup> 5 Geo. V, c. 8.

<sup>2</sup> As to which see p. 10, *ante*, note 1.

not a 'restriction' on the acquisition or user of land at all. It is founded upon the right of the subject, correlative to that of the Crown to take and use the land, and does not in any way limit or interfere with the acquisition and user. What is referred to as a restriction is contained in the provisions of the Defence Act, 1842, which impose upon the officers of the Crown the obligation to comply with certain formalities before possession can be obtained. The effect of the Regulation is to enable the Crown to acquire and use forthwith and without the authority, previously obtained, of the Lord-Lieutenant or other officers; the right of the subject to compensation remains wholly unaffected.

Secondly, the regulation if, upon its true construction, it purported to take away the right of the subject to compensation, would be invalid because it would not satisfy the statutory condition of being a regulation for the 'public safety and the Defence of the Realm'. It cannot contribute to the public safety for a subject to be deprived of compensation to which he is otherwise entitled. The Defence of the Realm is not promoted by denying compensation where it is due; the relief to the Treasury and the general body of tax-payers, which results if one subject is to bear his own loss instead of the loss being rateably borne by the whole community is not what is meant by the Defence of the Realm.

The judgments in the House of Lords sustained both these answers, though either of them was sufficient to destroy the Crown's argument under this head.

The Defence Act, 1842, has already been shown <sup>1</sup>

<sup>1</sup> p. 35, *ante*.



to bear striking resemblances to the Acts of 1798, of 1803, and of 1804 as regards both matter and form. The Defence of the Realm Consolidation Act, 1914<sup>1</sup> presents equally marked contrasts. The earlier statutes not only designate the subject-matter, they also regulate the manner in which the powers conferred by them are to be administered. The Acts themselves prescribe in detail the methods of obtaining possession and of assessing compensation in the absence of agreement. The powers of the Executive are therefore fully defined and regulated by Parliament itself, no power to make regulations being conferred by the older Acts upon the Executive or upon any subordinate authority.

Under the Defence of the Realm Act, on the other hand, Parliament merely marks out the field within which it delegates to the Executive authority to frame rules or regulations for giving effect to its intentions. It is only when a regulation is outside the ambit of the statute, or, in other words, when the government in the exercise of its statutory mandate has exceeded its authority, that a regulation can be challenged as being *ultra vires*.

According to strict constitutional theory the Executive governs, while Parliament legislates; the delegation of legislative authority to the Crown in Council therefore presents a paradox by apparently investing the same authority with both legislative and executive functions.<sup>2</sup> The authority

<sup>1</sup> 5 Geo. V, c. 8.

<sup>2</sup> Upon the subject of subordinate law-making bodies generally, see Dicey, *Law and Custom of the Constitution*, c. ii; Ilbert, *Legislative Methods and Forms*, c. iii. Statutory rules and orders 'stand on the debatable borderland between legislative and executive action', Ilbert, *The Mechanics of Law-making*, p. 139.

none the less remains a delegated one. It is therefore subject to control, and that control takes two distinct forms.

In the first place Parliament remains supreme ; it can revoke its authority and—at all events in theory—can even repudiate it. It can also declare that authority to have been exceeded and call its agents to account. Parliamentary control, however, tends to become less effective under the increasing pressure of public business and the corresponding tendency to restrict the opportunities for parliamentary criticism of the details of administration.

In the second place, the Courts will declare action under the delegated authority to be invalid and *ultra vires*, if the Executive travels outside the area within which its delegated authority may legitimately range. The grounds upon which the validity of a particular act of the Executive may be challenged are twofold. Such an act may be in excess of the authority conferred by the regulation under which it is done ; or the regulation may itself be *ultra vires*.

In construing the Defence of the Realm Consolidation Act, 1914,<sup>1</sup> the criterion to be adopted by the Courts as laid down by Parliament is that of necessity—the validity, whether of an executive Act itself, or of the regulation under which it is performed depending upon whether it be necessary for securing the public safety and the defence of the realm. The question therefore arises as to how far it is open or practicable for the Courts to determine the question of necessity. In the Constitutional controversies of the seventeenth century the

<sup>1</sup> 5 Geo. V, c. 8.

question was how far was the King the sole judge of the danger ; in the twentieth, although assuming a somewhat different form, it remains in essence the same.

## II

The material provisions of the Defence of the Realm Consolidation Act, 1914<sup>1</sup> are as follows :

Sect. 1 (1). 'His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for the purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf ; and may by such regulations authorise the trials by courts-martial, or in the cases of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations and in particular against any of the provisions of such regulations designed—

- (a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or the forces of his allies or to assist the enemy ; or
- (b) to secure the safety of His Majesty's forces and ships, and the safety of any means of communication and of railways, ports, and harbour ; or
- (c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces by land or sea or to prejudice His Majesty's relations with foreign powers ; or

<sup>1</sup> 5 Geo. V, c. 8.

- (d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty ; or
- (e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.

(2). Any such regulations may provide for the suspension of any restrictions on the acquisition of user of land, or the exercise of the power of making bye-laws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903, and any such regulations or any orders made thereunder affecting the pilotage of vessels may supersede any enactment, charter, bye-laws, regulation or provision as to pilotage.'

The form of this enactment calls for some comment. It is declared that 'His Majesty has power to make regulations'. Does this point to a recognition of any existing powers of the Crown under its prerogative, or does it refer merely to such powers as are derived from statute ? It was at one stage of the argument in the Case contended on behalf of the Crown that there is to be inferred from these words something in the nature of a recital or recognition of prerogative powers at Common Law. But this contention loses its force when reference is made to the earlier Defence of the Realm Acts, which were superseded by the Consolidation Act in which their provisions were incorporated. The first of these Acts,<sup>1</sup> which received the Royal Assent on August 8, 1914, was entitled, 'An Act to confer on His Majesty power to make regulations during the present war for the defence of the Realm.' It was limited to regulations for the prevention of

<sup>1</sup> 4 & 5 Geo. V, c. 29.

communication with the enemy and to securing the safety of means of communication, or of railways, docks, and harbours. An amending Act of August 28,<sup>1</sup> enlarged the scope of the first Act and contains the earliest reference to the Defence Acts by the insertion of the provisions which are now incorporated in section 1 (2) of the Consolidation Act. Neither the amending nor the Consolidation Act reproduces the title to the Act of August 8. The Consolidation Act does not in terms 'confer' power; it enacts, that 'His Majesty in Council has power during its continuance of the present war to issue regulations for securing its public safety and the defence of the Realm'. It is perhaps hardly material to consider whether the omission from the Consolidation Act of the title of the Act of August 8, and the rearrangement of the topics which are enumerated in the Acts which it supersedes, justify any inference that the existence of any prerogative power is given statutory recognition. The Consolidation Act does not purport to embody in the form of an enactment the Government's existing prerogative; it merely empowers the Crown to issue regulations—and there is no prerogative to make Regulations.<sup>2</sup> The wording of the Consolidation Act, therefore, throws no light upon the existence or extent of the prerogative powers claimed. Reliance was also placed in the argument on behalf of the Crown upon the terms of the Defence of the Realm (Acquisition of Land) Act, 1916,<sup>3</sup> which makes provision for the continuance in possession by any government department for a limited period after the termination of

<sup>1</sup> 4 & 5 Geo. V, c. 63.      <sup>2</sup> Per Lord Sumner, App. A, p. 199.

<sup>3</sup> 6 & 7 Geo. V, c. 63.

the war, and for the permanent acquisition of land of which possession has been taken, subject to the payment of compensation to be assessed in case of dispute by the Railway and Canal Commission. Sect. 1 (1) commences ‘Where during the course or within the week immediately preceding the commencement of the present war possession has been taken of any land by or on behalf of any Government department for purposes connected with the present war *in exercise or purported exercise of any prerogative right of His Majesty* or of any powers conferred by or under any enactment relating to the defence of the Realm or by agreement or otherwise. . . .’ The words in italics, it was contended, are a statutory confirmation and declaration of the power to take under the prerogative. The answer is that (1) if the prerogative does not extend to the taking of land without an obligation to make compensation, reference to prerogative powers cannot extend their scope, and (2) the words do not define the prerogative, but say that if the Crown has *de facto* taken, *quocunque modo*, it shall be lawful to continue in possession.<sup>1</sup>

It would be superfluous to enlarge upon the extent to which the power to make regulations has been exercised during the progress of the war. Regulation 1 lays down the general principles to be observed. ‘The ordinary avocations of life and the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures required to be taken for securing the public safety and the defence of the Realm, and ordinary civil offences will be dealt with by the

<sup>1</sup> Per Lord Dunedin, App. A, p. 176 ; per Lord Atkinson, *ibid.*, p. 188 ; per Lord Moulton, *ibid.*, p. 196.

civil tribunals in the ordinary course of law.' It is only necessary to peruse the Regulations made under the power conferred by the Defence of the Realm Act in order to appreciate how the executive found it impossible or inexpedient to refrain from interference with almost every department of national and private activity.

The occupation of land and buildings is provided for by Regulation 2 in the following terms :

'It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety and the defence of the Realm it is necessary so to do :

- (a) to take possession of any land and to construct military works, including roads, thereon, and to remove any tree, hedges, and fences therefrom ;
- (b) to take possession of any buildings or other property including works for the supply of gas, electricity, or water, and of any sources of water supply ;
- (c) to take such steps as may be necessary for placing any buildings or structures in a state of defence ;
- (d) to cause any buildings or structures to be destroyed or any property to be moved from one place to another, or to be destroyed ;
- (e) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid.'

To revert once more to the alleged prerogative. It is obvious that if the Common Law Powers of the Crown had sufficed to meet the emergency, there could have been no necessity to confer the same powers by means of regulations. If regulations

were required not merely to formulate and declare the Common Law powers of the Crown—still more if they were designed to augment them—they must be clearly expressed and *intra vires* the statute from which they derive their authority.

In examining the effect of the Act and Regulations two principal matters have to be borne in mind. Firstly the Act gives power by regulation to remove restrictions on the acquisition and user of land, and makes specific reference to the Defence Acts and the analogous legislation under the Military Lands Acts.<sup>1</sup> Secondly, no regulation has been made purporting to deal with the question of compensation for such acquisition or user; both the Act and the regulations are entirely silent on the subject of compensation.

The restrictions imposed by the Defence Acts have already been referred to.<sup>2</sup> So far as the facts of the Case are concerned, no restriction contained in the Act of 1842 could have operated to the prejudice of the national interest. The Suppliants did not refuse to 'treat and agree'. Had they done so the provisions of section 19 of the Defence Act, 1842<sup>3</sup> were available, and it could not be suggested that the emergency was such as to render compliance with the formality of giving fourteen days' notice injurious to the public interest. The Suppliants did not refuse to give up possession; there was therefore no occasion to obtain a certificate under section 23. But it was suggested that the liability to make compensation was itself a 'restriction'. In the broad sense every liability to pay is a restric-

<sup>1</sup> As to the Military Lands Acts, see p. 10, *ante*, note 1.

<sup>2</sup> p. 40, *ante*.

<sup>3</sup> 5 & 6 Vict., c. 94.



tion, but the restrictions for which section 1 (2) of the Consolidation Act provide are 'restrictions on the acquisition or user of land'. 'When those restrictions are examined,' says Lord Atkinson,<sup>1</sup> 'it is to my mind clear that the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either or a condition precedent to its acquisition.' 'The obligation to pay might discourage the exercise of the power of acquisition, but it does not limit that power. The power is complete independently of payment, and it is fully exercised before the obligation of payment arises.'<sup>2</sup>

In so far then as the Defence Act, 1842, imposed restrictions, no such restrictions operated to impede the officers of the Crown in the performance of their duties. Had it been otherwise the Consolidation Act gave power to relieve them of the impediment.

### III

The Crown claimed that the sole remedy of the Suppliants was to apply to a Commission known as the Defence of the Realm Losses Royal Commission<sup>3</sup> for a grant by way of compensation for the loss they would suffer by reason of the occupation of their premises. The Commission was appointed by warrant dated March 31, 1915, 'to inquire and determine, and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants

<sup>1</sup> App. A, p. 185.

<sup>2</sup> Per Lord Sumner, App. A, p. 200.

<sup>3</sup> Under the Indemnity Act, 1920 (10 & 11 Geo. V, c. 48) the Commission is now styled the War Compensation Court. For its constitution, jurisdiction, and functions see p. 159, *post*.

who (not being subjects of an enemy State) are resident or carrying on business in the United Kingdom, in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the defence of the Realm'.<sup>1</sup> The Commission therefore administered the bounty of the Crown. It had no jurisdiction in cases 'otherwise provided for' and declined to deal with cases in which an applicant had or claimed to have any rights enforceable in a Court of law under any statutory enactment or under any agreement to which the Crown was a party.

The Defence of the Realm Losses Commission was (with certain exceptions)<sup>2</sup> the tribunal ap-

<sup>1</sup> The warrant is set out in full in the first Report of the Commissioners (Cd. 8359/1916). This report should be referred to for the principles upon which the Commissioners have acted in executing the terms of their warrant. Further reports have been published in 1917 (Cd. 8751); 1918 (Cd. 9181); and 1919 (Cd. 404). See now the schedule to the Indemnity Act, 1920, for the principles upon which compensation is to be assessed.

<sup>2</sup> Claims arising out of the requisitioning of ships are submitted to the Admiralty Transport Arbitration Board constituted under a Royal Proclamation dated August 3, 1914 (*Manual of Emergency Legislation*, p. 386). See the notification, dated August 11 (*ibid.*, p. 387) and the amending notification dated August 31, 1914 (*ibid.*, p. 390). The Board has been held to be a regular tribunal of arbitration whose members can be ordered to state a Special Case for the opinion of the High Court under section 19 of the Arbitration Act, 1889 (*Lobitos Oilfields v. Admiralty Commissioners*, 86 L.J.K.B. 1444; 117 L.T. 28; 33 T.L.R. 472). For the substituted procedure by way of appeal to the Court of Appeal, see the Indemnity Act, 1920 (10 & 11 Geo. V, c. 48, s. 2). The Board is also designated under the Defence of the Realm Regulation, 39 B.B.B., as the tribunal for determining claims under the extended powers thereby conferred

pointed under the Defence of the Realm Consolidation Act, 1914, to deal with applications for compensation where private property had been requisitioned for purposes of defence.

The tribunal was an appropriate one if, and only if, the right to requisition extended to the taking of the property of the subject free from a legal obligation to make compensation. The Commission had no statutory authority and could only deal with claims *ex gratia*. It was not a legal tribunal, whose decisions would be subject to review in the Courts, and the principles which it adopted in carrying out the terms of the warrant under which it was constituted could not be challenged by way of appeal. If the subject claimed a right enforceable by law his remedy was in the Courts. In regard to the occupation of land that right has been vindicated by the judgments in the Case.

The majority of requisitions made during the war purported to be made under powers derived from Regulations made under the Defence of the Realm Acts. If the right of requisition be founded on the Acts and Regulations, the denial of a right *ex lege* to compensation can only be justified if, upon the proper construction of the Acts and Regulations,

upon the Shipping Controller. Provision has also been made in some cases for the determination of claims by a single arbitrator to be appointed in manner provided by order of an official or department ; as in the case of requisitions by the Food Controller under Regulation 2 F. By Regulation 7, compensation for the requisition of the output of factories is to be determined by the arbitration of a Judge of the High Court to be selected by the Lord Chief Justice (in Scotland by a Judge of the Court of Session, selected by the Lord President, and in Ireland by a Judge of the High Court of Ireland selected by the Lord Chief Justice of Ireland).

that right be excluded. If the right survives, the machinery provided by the Defence of the Realm Losses Commission is clearly inapplicable.

The Consolidation Act, it has been said, makes no reference to compensation, while the regulations, although they contain some provisions for the assessment of compensation in respect of the requisition of ships and chattels, contain no reference whatever to compensation for the taking of land. So far as the questions in the Case are concerned, it is only necessary to consider whether, assuming a right to compensation to exist, either at Common Law or under the Defence Acts, that right is destroyed by the provisions of the Consolidation Act. Statutes which affect existing rights, but make no express provision for compensation for the loss of those rights or for interference with their exercise, are to be interpreted according to a well-known canon of construction :

‘ It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons’ rights without compensation, unless one is obliged so to construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so.’<sup>1</sup>

So in *London & North Western Railway Co. v. Evans*,<sup>2</sup> Bowen, L. J., says :

<sup>1</sup> Per Brett, M.R., *Attorney-General v. Horner* (1884) 14 Q.B.D. 245, 257.

<sup>2</sup> (1893) 1 Ch. 16, 28. See also *Reg. v. Abbott* (1897) 2 I.R. 362, 405, *Commissioner of Public Works (Cape Colony) v. Logan*

‘The legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man’s property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it without plain expressions of such a purpose.’

The application of these principles to the facts of the Case is simplified by the fact that, while the Defence Act, 1842, expressly provides for the assessment and payment of compensation, neither the Consolidation Act nor the Regulations purport in express terms to negative the existence of such a right. The position therefore is that certainly in the case of land, and possibly as regards other property, the Defence of the Realm Acts and Regulations must be read in the light of existing Statutes by which the legal right of the subject to compensation is secured. If the Defence Acts entirely omit to deal with that right, the canon of construction as laid down in *Attorney-General v. Horner*<sup>1</sup> and *London & North Western Railway v. Evans*<sup>2</sup> applies and the right remains unimpaired.

But the argument on behalf of the Crown may be tested in another way. Assuming the Regulations to have provided in express terms that property may be taken without making compensation, such a provision, made not by statute, but under the (1903) A.C. 355, 363. *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.* (1919) A.C. 744. *Rooney v. Department of Agriculture* (1920) 1 Ir. R. 176.

<sup>1</sup> *Ubi supra.*

<sup>2</sup> *Ubi supra.*

authority delegated to the Executive can only be justified on the ground of such a necessity for the defence of the Realm as would satisfy the express terms of the Act. Now that the taking itself was justified on this ground was not disputed. Can it, however, be said that it was 'necessary for the public safety and the defence of the Realm' that the property of the subject should be taken free from any obligation of payment? Judged by this test, there can be no doubt that such a Regulation is *ultra vires*. 'Neither the public safety nor the defence of the Realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects.'<sup>1</sup>

#### IV

What has already been said in this chapter covers the ground traversed in the argument and judgments in the case so far as the Defence of the Realm Consolidation Act and Regulations are concerned. It may, however, be useful to indicate some of the more general considerations which are applicable when the Act and Regulations are examined.

The decision in the Case furnishes an instance in which the Courts have considered the question of necessity and decided it adversely to the contentions of the Crown. The principles to be applied by the Courts in considering this question are not easy to formulate. Where the issue is whether a particular executive act done under the authority of a regulation which is itself *intra vires* be necessary, or not, the duty cast upon the Courts is peculiarly onerous, and it may be assumed that they will not interfere with

<sup>1</sup> Per Lord Atkinson, App. A, p. 186.

the discretion of the Executive, where that discretion has been properly exercised. Thus in *The Zamora* <sup>1</sup> Lord Parker says :

‘ A judge ought as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the Defence of the Realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. . . . Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.’

To this, as a general proposition, no one will demur ; but it is possible to conceive cases in which an executive act may so obviously fail to be justified by the emergency that the Courts will interfere. Apart from cases of this character, the question is primarily whether a particular executive act can be justified as being within the authority under which it purports to be done. Thus in *China Mutual Steam Navigation Company Limited v. Maclay*,<sup>2</sup> while the requisition of the plaintiffs’ steamers was assumed to be valid, a direction that they were to be run for the account of the Government, crediting full earnings and debiting net charges, was held to go beyond the powers conferred on the Shipping Controller, inasmuch as the effect was to requisition not only the steamers, but also the services of the owners and of their staff.

The doctrine that the validity not merely of an executive act but of a regulation made by a duly

<sup>1</sup> (1916) 2 A.C. 77, 106.

<sup>2</sup> (1918) 1 K.B. 33.

authorized department of government is not open to review in the Courts receives some support from the judgments in *R. v. Halliday*<sup>1</sup> which dealt with the validity of Regulation 14B, empowering the Secretary of State to order the internment of any person 'of hostile origin or associations', where on the recommendation of a competent naval or military authority it appears to him expedient for securing the public safety and the defence of the Realm. The validity of the Regulation as justifying the preventive detention of suspected persons was upheld in the House of Lords with one dissentient.<sup>2</sup> 'It may be necessary,' says Lord Finlay, 'in a time of great public danger to entrust great powers to his Majesty in Council and that Parliament may do so feeling certain that such powers will be reasonably exercised.'<sup>3</sup> It is submitted that the Lord Chancellor did not intend to lay down so broad a proposition as that the method by which the authority conferred by Parliament is exercised is not open to review in the Courts. Lord Atkinson indeed,<sup>4</sup> in suggesting that a regulation which on its face required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the Realm might be *ultra vires* and void, expressly

<sup>1</sup> (1917) A.C. 260.

<sup>2</sup> The Judgment of Lord Shaw of Dunfirmline contains a powerful vindication of the right of the subject to personal liberty and of the supremacy of Parliament. See the passage quoted at p. 104, *post*.

<sup>3</sup> *Sheffield Conservative and Unionist Club v. Brighton* (1916) 85 L.J. (K.B.) 1669; *Lipton v. Ford* (1917) 2 K.B. 647; *Rex v. Governor of Wormwood Scrubbs Prison: Ex parte Foy* (1920) 2 K.B. 305.

<sup>4</sup> (1917) A.C. p. 272.



reserved the point for consideration if and when it should become necessary to decide it. The question in such a case would be, not whether the donee of a discretionary power would exercise the power unreasonably,<sup>1</sup> but whether he has the power at all,<sup>2</sup> and it is from this point of view that the criterion of necessity has been applied in several cases in the Courts of first instance, none of which have so far been argued on appeal.

In *Chester v. Bateson*<sup>3</sup> the validity of Regulation 2 A (2) was successfully challenged on the ground that it cannot be a necessary or even reasonable way to aid in securing the public safety and the defence of the Realm to give power to a minister to forbid any person to exercise the ordinary right of citizens to resort to the King's Courts in order to obtain redress for a wrong.

In *Newcastle Breweries Limited v. The King*<sup>4</sup> two points were decided. The Admiralty having requisitioned a quantity of rum, claimed that by virtue of Regulation 2 B the owners were entitled

<sup>1</sup> A donee of discretionary power (as for instance the Home Secretary under Art. 12 (1) of the Aliens Order, 1919, made by virtue of the Aliens Restriction Act, 1914 (4 & 5 Geo. V, c. 12, s. 1, sub-sec. 1 (c)) is an executive, and not a judicial officer, and is therefore not bound to hold an inquiry, or to give to a person against whom he proposes to make an order an opportunity of being heard. *R. v. Inspector of Leman Street Police Station: Ex parte Venicoff*. *R. v. Secretary of State for Home Affairs: Ex parte Venicoff* (1920) 3 K.B. 72.

<sup>2</sup> See *Attorney-General v. Brown* (1920) 1 K.B. 773, 791, in which it was held that the power conferred on the Crown to prohibit the import of arms, ammunition, gunpowder, or any other goods by Proclamation or Order in Council does not, upon the application of the *ejusdem generis* rule of construction, extend to goods of any class other than that specified.

<sup>3</sup> (1920) 1 K.B. 829.

<sup>4</sup> *Ibid.*, 854.

by way of compensation to be paid less than the market price ; and further that in the absence of agreement the claim of the owners to compensation fell to be determined by the Defence of the Realm Losses Commission. The decision of Mr. Justice Salter on both points was in favour of the owners. With regard to the tribunal, he was of opinion that a Regulation which takes away the right of a subject to a judicial decision or transfers the adjudication of his claim, without his consent, from a Court of law to named arbitrators, cannot fairly be held to be a regulation for securing the public safety and the defence of the Realm, or a Regulation designed to prevent the successful prosecution of the war being endangered, within the meaning of these words in the Consolidation Act. The second point bears a close analogy to the questions in the Case. It depended upon the existence, before the enactment of the Defence of the Realm Acts, of a statutory right to compensation. That right was secured to the owners of goods under the provisions of the Army Act, 1881,<sup>1</sup> as extended by the Army (Supply of Food, Forage, and Stores) Act, 1914,<sup>2</sup> the Naval Billeting Act, 1914,<sup>3</sup> and the Army (Amendment) Acts, 1915,<sup>4</sup> the effect of which is to give to the owner of food, forage, and stores of every description which are requisitioned the right to the fair market value of his goods, and the further right to have the value assessed in the event of dispute by a County Court Judge. In the case of requisitions of land, the right to compensation and the tribunal by which compensation is to be assessed depend entirely

<sup>1</sup> 44 & 45 Vict., c. 58.

<sup>2</sup> 4 & 5 Geo. V, c. 26.

<sup>3</sup> Ibid., c. 70.

<sup>4</sup> 5 Geo. V, c. 26 & c. 58.

upon statute, and no express provision purporting to affect either the right or the remedy is to be found in the Defence of the Realm Acts and Regulations. In *Newcastle Breweries Ltd. v. The King*<sup>1</sup> the rights of the subject were also defined by statute and the decision depended upon the extent to which specific regulations made to meet a particular emergency were inconsistent with the existing statutory provisions.

*Hudson's Bay Co. v. Maclay*,<sup>2</sup> in which the validity of Regulations 39 B.B.B. and 39 D.D. was unsuccessfully challenged, stands upon a somewhat different footing. The office of Shipping Controller was constituted under the New Ministries and Secretaries Act, 1916,<sup>3</sup> section 6 of which provides that it shall be his duty 'to control and regulate any shipping available for the needs of the country in such manner as to make the best use thereof, having regard to the circumstances of the time, and to take such steps as he may think best for providing and maintaining an efficient supply of shipping'. He is to have 'such powers or duties of any Government department or authority, whether conferred by statute or otherwise, as His Majesty may by Order in Council transfer to him or authorise him to exercise or perform concurrently with or in consultation with the Government department or authority concerned, and also such further powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914, and regulations may be made under that Act accordingly.'

Under the powers conferred by regulations 39 B.B.B. and 39 D.D. the Shipping Controller

<sup>1</sup> (1920) 1 K.B. 854.

<sup>2</sup> (1920) 36 T.L.R. 469.

<sup>3</sup> 6 & 7 Geo. V, c. 68.

claimed power to grant or refuse licenses enabling British vessels to put to sea ; to order vessels to load such cargoes as he might direct (as, for example, cargoes carried for the Royal Commission on wheat supplies), and to order vessels to carry cargoes so loaded between named ports and to fix the rates of freight at which such cargoes should be carried. Mr. Justice Greer arrived at the conclusion that the regulations in question were not *ultra vires*. With regard to the right to regulate the rates of freight, he founded his opinion mainly upon the view that it would have been of little use to give to the Shipping Controller power to direct vessels to carry cargo at the market rate. Inasmuch as the object of the Regulations was to assist in the reduction of the cost of the carriage of food and of raw materials, that object was difficult if not impossible of fulfilment so long as the market rate was permitted to obtain. This decision involves the proposition that a power to fix prices and terms for the carriage of goods for a government department is within the powers which may be granted by regulations made for securing the public safety and the defence of the Realm. It involves the further proposition that it is for the King in Council to decide how those prices are to be ascertained.

Upon the question of the right to designate by means of regulation the method of ascertaining compensation the recent decisions disclose some difference of judicial opinion. It may be that with regard to goods requisitioned for the use of the Army and Navy the statutory provisions for the assessment of compensation at the market rate exclude any power to provide for assessment on a different principle and by a different tribunal.

If, however, the judgment of Mr. Justice Salter in *Newcastle Breweries Limited v. The King*<sup>1</sup> involves the proposition that the King in Council has not power to issue regulations which will enable the country to acquire its necessary stores at less than current market prices, or at prices fixed by a board of arbitrators and based on cost and reasonable profit, Mr. Justice Greer in *Hudson's Bay Co. v. Maclay*<sup>2</sup> does not agree, while Mr. Justice Darling in *Robinson and Company, Limited v. The King*<sup>3</sup> (decided under Regulation 2 B) is in accord with Mr. Justice Greer.

## V

The following conclusions may, it is submitted, be drawn from the decisions upon the Defence of the Realm Consolidation Act, and the Regulations<sup>4</sup>:

(1) Regulations purporting to be made under the Act are only valid in virtue of the authority which Parliament has seen fit to delegate. No regulation, therefore, can be valid if the authority does not extend so widely as to cover it. The authority is in many ways an extremely wide one, but the limitation that regulations are to be made 'for the public safety and the defence of the Realm' lays down boundaries which cannot effectively be passed.

(2) Where a regulation is of a character which would, in ordinary circumstances, fall within the statutory objects and purposes thus defined, the question may arise whether the regulation is in fact inside or outside this object and purpose. There is clear authority to show that in such cases

<sup>1</sup> (1920) 1 K.B. 854.    <sup>2</sup> (1920) 36 T.L.R. 469.    <sup>3</sup> *Ibid.*, 773.

<sup>4</sup> For the effect of the provisions of the Indemnity Act, 1920 (10 & 11 Geo. V, c. 48), *vide* p. 158, *post*.

the Executive must be the judge and that the Courts cannot conduct an inquiry into the question whether the public safety and the defence of the Realm in fact call for a particular regulation.<sup>1</sup>

(3) But it is quite possible to imagine a regulation which, having regard to its subject-matter, could not be regarded as made for the public safety and the Defence of the Realm, and in such a case the courts would not hesitate to declare it invalid. For example, it cannot be within the statutory purpose to provide by regulation that a subject shall be barred from recourse to the courts of law; and a regulation which attempts to deprive a subject of his remedy in the courts has been declared *ultra vires*.<sup>2</sup> In the same way the much-debated question whether a regulation providing for the internment of a British subject on the ground of his hostile origin or associations without previous conviction or trial could be valid was answered by a majority of the House of Lords in the affirmative.<sup>3</sup>

(4) Certain other questions which suggest themselves as to the scope of the Regulations must be regarded as unsettled. For example, the Regulations themselves could have no operative effect beyond a period defined by reference to the 'duration of the war'. But assuming a regulation to have been made at a time when actual hostilities are still proceeding and to have been validly made for the public safety and the defence of the Realm, is it

<sup>1</sup> *Vide*, per Lord Parker in *The Zamora* (1916) 2 A.C., p. 106.

<sup>2</sup> *Chester v. Bateson* (1920) 1 K.B. 829. For the constitutional right of access to the Courts, see *In re Boaler* (1915) 1 K.B. 21, per Scrutton, L.T., p. 36.

<sup>3</sup> *Rex v. Halliday* (1917) A.C. 260.

clear that everything done under such a regulation down to the time when the war has been technically determined is valid? Or can it be successfully argued that the validity of action taken under a regulation does not depend solely upon whether the regulation was valid when originally made and whether the war is still technically continuing, but also upon whether the action when taken can in fact be regarded as done for the public safety and the defence of the Realm? This question was mooted in *Rex v. Governor of Wormwood Scrubbs Prison*<sup>1</sup> but was not decided, since the Divisional Court held that in any event the test suggested was satisfied by the date of the applicant's internment.

To give another illustration: assuming a regulation relating to the control of the supply of food<sup>2</sup> to have been valid when made at a time when the food supplies of the country were being threatened by German submarines, is the regulation necessarily such as to authorize and justify administrative action until the technical termination of the war?<sup>3</sup>

<sup>1</sup> (1920) 2 K.B. 305.

<sup>2</sup> The office of Food Controller was constituted 'for the purpose of economizing and maintaining the food supply of the country during the present war' (New Ministries and Secretaries Act, 1916 (6 & 7 Geo. V, c. 68) s. 3). That of the Shipping Controller was created 'for the purpose of organizing and maintaining the supply of shipping in the national interests in connexion with the present war' (*ibid.*, s. 5).

<sup>3</sup> Under the Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. V, c. 59) the Crown may declare by Order in Council what date is to be treated as the date of termination. War with Germany was declared to have been terminated on January 10, 1920, by an Order in Council of February 9, 1920 (S.R. & O. 1920, no. 264). An Order in Council declaring war with Austria to have been terminated on July 16, 1920, was made on July 22 (*London Gazette*, July 23, 1920, p. 7765).

The search for positive criteria by which to test the validity of regulations made under the wide powers conferred upon the Executive by the Defence of the Realm Acts induces the reflection that such interference with the liberty of the subject, whether in regard to person or property, as may be necessary for the successful prosecution of war should, as far as possible, be imposed by the direct authority of Parliament rather than by administrative action.

‘The form in modern times’, says Lord Shaw of Dunfermline in his dissenting judgment in *Rex v. Halliday*,<sup>1</sup> ‘of using the Privy Council as the executive channel for statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the Constitution His Majesty acts only through his Ministers, is simply the Government of the day. The author of the power is Parliament; the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question *ultra* or *intra vires* such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would lie public unrest and public peril.’ On all this there is no disputing.’

<sup>1</sup> (1917) A.C., at p. 287.



## CHAPTER V

### THE EFFECT OF STATUTE UPON THE PREROGATIVE

‘THE word prerogative has been much used, though seldom understood. The notion the greatest men of our law have had of it, has been that it is a power lodged in the Crown for which there is no law, but not repugnant to any law. The meaning is, the execution of it being vested in the King, and it being impossible the legislature should foresee all cases that may happen, have left a power with the chief magistrate to use his discretion upon extraordinary occasions, and to exercise the supreme authority in all cases where the law of the land has not directed or limited the execution.’<sup>1</sup>

This description of the prerogative powers of the Crown emphasizes the fact that the prerogative is a survival—the residue of the discretionary powers of the Executive which are not definitely regulated by law. The history of the prerogative is, therefore, a history of the legislation by which the executive functions of the Crown have been declared, regulated, and restricted. The first stage in this process is mainly if not entirely declaratory. Constitutional documents such as Magna Carta, the Bill of Rights, and the Act of Settlement are often regarded as in their nature contractual, representing a bargain between King and people

<sup>1</sup> Dartmouth’s note to Burnet’s *History of his own Time* (Oxford ed., 1823, ii. 98).

arrived at by way of compromise as the result of negotiation.<sup>1</sup> While this view may be accurate in regard to the Act of Settlement it is perhaps hardly justified in connexion with the two earlier documents. Magna Carta, in particular, is in its essence declaratory of an assumed or existing body of legal principle.<sup>2</sup> The point emerges clearly in the confirmation of the Great Charter in the time of Edward I.<sup>3</sup> ‘Our justices, sheriffs, mayors, and other ministers who under us have the laws of our land to guide shall allow the said charters in pleas before them and judgments in all their points; that is to say the Great Charter of Liberties as *common law* and the Charter of the Forest according to the Assize of the Forest, for the relief of our people.’ The Statute Book therefore commences with an affirmation of the common law, embodying a declaration of existing law rather than an enactment of anything new. The doctrine that the Crown is not bound by statute unless specifically named only emerges in the subsequent history of legislation when the restrictive operation of statutes becomes more pronounced.

Modern statutes are, however, assumed to have an operative effect, and not merely to record existing rights. ‘If a statute merely recorded existing inherent powers, nothing would be gained

<sup>1</sup> Boutmy, *Studies in Constitutional Law*, pt. i, s. iv.

<sup>2</sup> This aspect of the Great Charter is fully developed in Professor McIlwain’s paper on ‘Magna Carta and the Common Law’ in *Magna Carta Commemoration Essays* (1917). ‘The Common Law has been largely encroached on by Act of Parliament, and, in our own day, it is possible that it may come to owe the whole of its binding force to statute’, Maine, *Early Hist. of Institutions*, p. 361.

<sup>3</sup> 25 Edw. I, Stat. i, c. 1.

by the enactment, for nothing would be added to the existing law.’<sup>1</sup> The general principles to be applied in construing statutes are thus summarized by Mr. Justice Sankey in *Attorney-General v. Brown*.<sup>2</sup> ‘In construing an Act of Parliament it is, in my view, legitimate to consider (1) the state of the law at the time the Act of Parliament was passed, and the changes it was passed to effect ; (2) the sections and structure of the Act of Parliament as a whole ; see *Stradling v. Morgan*,<sup>3</sup> where it is said, ‘The Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts, which were general in words, to be but particular, where the intent was particular. . . . The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, . . . which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion’ : and see also *Heydon’s Case*<sup>4</sup> and *Hawkins v. Gathercole*,<sup>5</sup> per Turner, L. J., where he says : ‘In determining the question before us we have therefore to consider

<sup>1</sup> Per Lord Sumner, App. A. p. 202.    <sup>2</sup> (1920) 1 K.B. 773, 791.

<sup>3</sup> (1560) Plowd. 199, 204 ; 75 E.R. 305, 312.

<sup>4</sup> (1584) 3 Rep. 7 ; 76 E.R. 637.

<sup>5</sup> (1855) 6 De G.M. & G. 1, 21.

not merely the words of this Act of Parliament but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject.'

These general principles of construction are, however, to be applied subject to the rule which is generally stated in the form that the Crown is not bound by a statute unless expressly named, a doctrine which is thus formulated in *Willion v. Berkley*<sup>1</sup>: 'It is usual for the legislature, in Acts of Restraint which they intend to bind the King, to name him expressly, and if he is not expressly named, it has always been taken heretofore that the legislature intended only to bind the subjects, and to make the Act extend to them, and not to the King, for he is favoured in all expositions of acts. And because it is not an act without the King's assent, it is to be intended that when the King gives his assent, he does not mean to prejudice himself or to bar himself of his liberty and privilege, but he assents that it shall be a law among his subjects.'<sup>2</sup>

It was contended in the argument of the Case on behalf of the Crown that in case of necessity for the public defence the alleged prerogative has not been abated, abridged, or curtailed by any statute. If, as has been established, the Defence Acts, 1842 to 1873,<sup>3</sup> with or without the provisions of the Defence of the Realm Consolidation Acts, 1914<sup>4</sup>

<sup>1</sup> (1560) Plowd. 223, 239; 75 E.R. 339, 365.

<sup>2</sup> Cited *Attorney-General v. Donaldson* (1842) 10 M. & W. 117, 123; 152 E.R. 406, 408.

<sup>3</sup> See p. 10, *ante*, note 1.

<sup>4</sup> 5 Geo. V, c. 8.

make all necessary provision to meet the emergency with which it became necessary to deal, there is involved in this contention the proposition that the Crown has a right to elect between proceeding either at Common Law or under the statutes. If this proposition can be maintained, it follows that the Crown may disregard the express provisions of the legislature whatever may be the restrictions or limitations imposed by statute upon the powers which the Crown requires to exercise. The result would be that the Crown could either act in all cases independently of the statutes and refuse to make compensation; or might conceivably discriminate as between subject and subject 'enriching one by electing to proceed under the statute and impoverishing another when it requisitions under the alleged Prerogative'.<sup>1</sup>

The only reference to the prerogative which occurs in the Defence Acts, 1842 to 1873, is in section 34 of the Act of 1842, by which power is given to the principal Officers of the Ordnance<sup>2</sup> to sue under their official titles without naming the individuals who for the time being hold office in that department. The section contains a proviso that :

'Nothing herein contained shall be taken to defeat or abridge, in any such Action, Suit, or other Proceedings the legal Rights, Privileges, and Prerogatives of Her Majesty, Her Heirs, and Successors, but that in all such Actions, Suits, or other Proceedings, brought or instituted in the Name and on behalf of the principal Officers of Her Majesty's

<sup>1</sup> Per Lord Sumner, App. A, p. 203.

<sup>2</sup> Now the Principal Secretary of State for War, see p. 36, *ante*, note 1.

Ordinance, and in all Matters relating, thereunto, it shall be lawful for the said principal Officers to claim, exercise, and enjoy all the same Rights, Privileges, and Prerogatives which have been heretofore claimed, exercised, and enjoyed in any Actions, Suits, or other Proceedings whatsoever in any Court of Law or Equity, by Her Majesty or Her Predecessor in the same Manner as if the Subject Matter of the said Suits or other Proceedings were vested in the Crown, and as if the Crown were actually a Party to such Actions, Suits, or other Proceedings: Provided also that it shall be lawful for Her Majesty to proceed by Information in Her Court of Exchequer, or by any other Crown Process, legal or equitable, in any Case in which such Actions, Suits, Arbitrations, or other Proceedings might have been otherwise instituted.'

The object of the proviso is clearly to preserve the prerogative rights of procedure in litigation, as for example the right of the Crown to refuse to give discovery<sup>1</sup> or the right to select the venue.<sup>2</sup> Except to this limited extent the Crown is not named. Is the Crown none the less bound?

The test is formulated in Bacon's Abridgement<sup>3</sup>:—

'Where an Act is made for the public good, the advancement of religion and justice, and to prevent injury and wrong the King shall be bound by such Act, though not particularly named therein. But where a statute is general and thereby any preroga-

<sup>1</sup> See Robertson, *Civil Proceedings by and against the Crown*, p. 598.

<sup>2</sup> *Ibid.*, p. 581.

<sup>3</sup> 7th ed., p. 462. Cited *Ex parte Postmaster-General: In re Bonham* (1879) 10 Ch. D. 595. See also the *Case of Magdalen College* (1616) 11 Rep. 74 b; 77 E.R. 1247, and the authorities cited in Chitty, *Prerog.*, c. xv.

tive, right title or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him.'

These propositions are supported by numerous ancient authorities, of which the following may be taken as illustrations. There was undoubtedly an ancient customary right in the Crown in virtue of its prerogative to exact contributions from merchants for tonnage and poundage, and also charges upon the wool merchants in respect of each bale of wool, and the like. But as soon as the Commons have made a grant to the King of a subsidy which, by the terms of a grant, is derived from one of these sources, from which the King had by his prerogative a right to collect a contribution, the Statutory right is lost and the revenue is thenceforth to be derived from the grant and is not to be collected under the prerogative.<sup>1</sup>

Another illustration is to be found in *Crooke's Case*<sup>2</sup> in which the question was whether the King was bound by a Statute<sup>3</sup> by which it was enacted that two parishes in London should be united and should be established as one parish. It was provided that the first presentation should be made by the patron of the living whereof the endowment was of the greatest value. The King being the patron of one living and a subject of the

<sup>1</sup> Rolle, *Abr. Tit. Prerog. le Roy*, p. 180, no. 50. See generally on this subject, Hall, *History of the Custom-Revenue*.

<sup>2</sup> (1691) 1 Shower K.B. 208 ; 89 E.R. 540.

<sup>3</sup> 22 Car. II, c. 11, s. 68 (1670) 'An additional Act for rebuilding the City of London,' i.e. after the great fire of 1666. An earlier Act had been passed in 1666 (18 & 19 Car. II, c. 8 : 19 Car. II, c. 3, Ruff.).

other and more valuable one, the King nevertheless claimed the nomination. The report in Shower only gives the argument. 'The King takes a benefit by this clause; it is plain that he is bound, for otherwise he could not have any presentment to this Church at all, and, if he take it, he must take it under the mode and qualifications that the act gives him.' In the result the subject 'had institution and enjoyed it without further trouble as ever I heard'.<sup>1</sup>

The Defence of the Realm falls peculiarly within the province of the Crown.<sup>2</sup> 'Where Parliament has intervened and has provided by statute for powers previously within the Prerogative being exercised in a particular manner and subject to the limitations contained in the statute, they can only be so exercised. Otherwise what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back upon the Prerogative?'<sup>3</sup> And where the whole field is covered by statute, the subject-matter being identical, there is 'no room for asserting an unrestricted Prerogative right as existing alongside with the statutory powers'.<sup>4</sup>

Where an Act of Parliament has according to its true construction 'embraced and confirmed'<sup>5</sup> a right which has previously existed by custom or prescription, that right becomes henceforward

<sup>1</sup> The report adds 'There were two instances where under colour of this Prerogative, the King's presentee was first preferred, though his living was of less value. But this was done by Jeffries, and never contested'. <sup>2</sup> Chitty, *Prerog.*, c. iv, s. 5.

<sup>3</sup> Per Swinfen-Eady, M. R. (1919) 2 Ch., 216, cited by Lord Atkinson, App. A, p. 182. <sup>4</sup> Per Lord Sumner, App. A, p. 202.

<sup>5</sup> Per Littledale, J., *In the matter of Islington Market Bill* (1835), 3 Cl. and F., p. 518; 6 E.R. 153.



a statutory right. 'The lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament'.<sup>1</sup>

The effect of statutory upon prerogative powers is, therefore, that where the subject-matter is identical,<sup>2</sup> and the whole ground of something which could be done under the Prerogative is covered by statute, it is the statute that rules,<sup>3</sup> and the statutory powers alone can be employed. The Common Law powers are not in the strict sense merged in the statute; it is more accurate to say<sup>4</sup> that 'when a statute expressing the will and intention of the King and of the three Estates of the Realm is passed, it abridges the Royal Prerogative while it is in force to this extent, that the Crown can only do the particular thing under and in accordance with the statutory provisions, and its prerogative power to do it is in abeyance'.<sup>5</sup>

<sup>1</sup> Per Lord Shand, *New Windsor Corporation v. Taylor* (1899) A.C., p. 49.

<sup>2</sup> Per Lord Sumner, App. A, p. 202.

<sup>3</sup> Per Lord Dunedin, App. A, p. 172.

<sup>4</sup> Per Lord Atkinson, App. A, p. 184.

<sup>5</sup> The test as formulated in Bacon's Abridgement may also be regarded as an example of the general principle that the Crown is bound by statute only when the intention of the legislature to bind it is clear and unmistakable (*Wheaton v. Maple* (1893) 3 Ch., 64). See also *In re Henley & Co.* (1879) 9 Ch. D. 469; *Coomber v. Berks. Justices* (1883) 9 A.C. 66; *Gorton Local Board v. Prison Commissioners* (1887) reported in note to *Cooper v. Hawkins* (1904) 2 K.B. 164.

## CHAPTER VI

### PETITION OF RIGHT

#### I

THE form of procedure by which the Suppliants asserted and vindicated their legal rights involves the recognition of certain prerogative rights of the Crown in respect of litigation. 'The King hath a prerogative not to be sued by writ'<sup>1</sup> and it is beyond dispute that an action does not lie against the Crown at the suit of a subject.<sup>2</sup> 'I take it to be generally true,' says Lord Somers,<sup>3</sup> 'that in all cases where the subject is in the nature of a Plaintiff, to recover anything from the King, his only remedy at Common Law is to sue by petition to the person of the King.'

The remedy by Petition of Right has a long history which it would be unnecessary to recite in any detail in this essay.<sup>4</sup> Its origin, which is surrounded by some obscurity, has been ascribed to a statute of Edward I—before whose time it has been said that claims against the sovereign could be brought by ordinary action.<sup>5</sup> The authority for this statement is confined to two statements by

<sup>1</sup> Staundford, *Praerog.*, p. 42a.

<sup>2</sup> Com. Dig. Action, c. 1; Chitty, *Prerog.*, p. 339; Dicey, *Parties to an Action*, p. 5.

<sup>3</sup> *The Bankers' Case* (1700) 14 How. St. Tr. 184.

<sup>4</sup> See the learned work on Petition of Right by the late Walter Clode, to which the authors desire to acknowledge their indebtedness in preparing the following historical summary.

<sup>5</sup> Cutbill, *Inquiry into the History and Nature of Petition of Right* (1874). Allen, *Essay on the King's Prerogative* (1849), p. 95.

counsel in argument and two judicial dicta—all in the reign of Edward III.<sup>1</sup> No such statute has been found; and an unrestricted right to sue the Crown is hardly consistent with the constitutional position of the Crown at this time, or with the course of development followed by English civil procedure. ‘It is not probable’, says Erle, C. J., in *Tobin v. The Queen*,<sup>2</sup> ‘that the subject would have a defined right to the writ against the King when the rights between subject and subject and the writs for enforcing them were in an unsettled state.’

Whatever may be the origin of this form of procedure, the practice of petitioning the Crown in Parliament for the redress of grievances dates back to an early period and was regulated and developed in the reign of Edward I. Petitions were common in regard to grievances which could only be remedied by the benevolence of the Crown as well as to matters of complaint which might properly form the subject of investigation by legal tribunals. Petitions of both classes are to be found in great numbers in the Rolls of Parliament. The great variety of matters led to a classification of petitions according to the remedy which was considered appropriate. Thus if the petition touched the revenue, or was a matter of account between the subject and the Crown, it was referred to the Treasurer and Barons of the Exchequer; if a pure matter of law, to the ordinary tribunals; if a matter of local custom, to the Chancellor. If no appropriate tribunal existed, a special tribunal was created in the form of a body of commissioners, to inquire and report to the

<sup>1</sup> Set out, Clode, *Petition of Right*, p. 3, where the adverse statements of text writers are also collected.

<sup>2</sup> (1864) 16 C.B. (N.S.), 310, p. 357; 143 E.R. 1148, p. 1166.

King. In regard to matters which involved a claim against the Crown founded on legal considerations the petitions were apparently confined to claims for the restitution of property. In such cases the question of title was referred to commissioners in order that the facts might be ascertained, after which the petition was remitted to a regular legal tribunal for adjudication.

Parliament having, as early as the reign of Edward I, become overburdened with the multiplicity of petitions, two statutes were enacted to relieve the pressure. The object of the Statute of Petitions<sup>1</sup> and of the Ordinance of Petitions<sup>2</sup> was to transfer to the Chancellor, the Exchequer, and the Judges such petitions as fell within their respective provinces. But there remained a substantial residue which continued to be presented to Parliament until, in the reign of Richard II, a threefold division of bills and petitions was adopted. Firstly, 'Bills of Parliament' were heard in open Parliament, and on receiving the Royal Assent became statutes. Secondly, 'Bills of Council', which included all the remaining petitions except those for which the personal answer of the King was necessary, no longer went before Parliament to be referred to a commission, but were dealt with by committees of the King's Council<sup>3</sup>—which in course of time developed into such tribunals as the Court of Chancery, the Privy Council, the Star Chamber, and the Court of Requests.

<sup>1</sup> 8 Edw. I (1280), Clode, p. 15. Not in Ruffhead or in the Statutes of the Realm.

<sup>2</sup> 12 Edw. I (1284), Clode, p. 15. Not printed in the collections referred to. For legislation by Ordinance at this time, see Maitland, *Constitutional History*, p. 186.

<sup>3</sup> Clode, p. 17. Baldwin, *The King's Council*, pp. 188, 258, 284.

Finally, petitions which contained legal claims against the Crown, that is to say claims in which the subject asserted a legal right were classified as Bills of Grace, and 'baillez au Roy mesmes'. These still required an answer or endorsement by the King. It is this procedure which has survived in substance, although with considerable modifications in the direction of simplicity, to the present day, in the modern form of a Petition of Right.

## II

The old procedure, although not abolished by the Petitions of Right Act, 1860,<sup>1</sup> which merely provides an alternative, was exceedingly antiquated and cumbersome, and is not likely to be adopted in future by any litigant who may have occasion to present a legal claim against the Crown. The *arcana* of the subject may be studied in *Baron de Bode v. The Queen*,<sup>2</sup> which was commenced in 1839 and finally decided by the House of Lords in 1851, and is reported in all its stages.

The effect of the Petitions of Right Act, 1860,<sup>1</sup> is to apply the existing practice of the Courts to petitions of right, subject to such prerogative rights of the Crown as existed at the date when the act became law.<sup>3</sup> Section 7 provides that :

<sup>1</sup> 23 & 24 Vict., c. 24.

<sup>2</sup> (1840) 2 Ph. 85; 41 E.R. 874; 1 Coop. t. Cott. 143; 47 E.R. 786; (1845) 8 Q.B. 208; 115 E.R. 854; (1848) 13 Q.B. 364; 116 E.R. 1302; (1851) 3 H.L.C. 449; 10 E.R. 176. See also *In re Robson* (1846) 2 Ph. 84; 41 E.R. 873; *In re von Frantzius* (1858) 2 DeG. & J. 126; 44 E.R. 936; *In re Rolt* (1859) 2 DeG. & J. 44; 45 E.R. 18.

<sup>3</sup> The procedure under the Petitions of Right Act, 1860 (23 & 24 Vict., c. 24) is applied to Ireland by the Petitions of

‘ So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and Statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of Law and Equity respectively for the time being in reference to such suits and personal actions, shall unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right. Provided always that nothing in this Statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.’

The procedure is, therefore, assimilated to that which governs actions between ordinary litigants.<sup>1</sup> But that the Crown can still be sued only if it consent is made clear by section 2 of the Act which

Right (Ireland) Act, 1873 (36 & 37 Vict., c. 69) with the necessary modifications. In Scotland the procedure by Petition of Right is unknown and the Crown may be sued like a subject—see 20 & 21 Vict., c. 44: ‘ An Act to regulate the Institution of Suits at the instance of the Crown and the Public Departments in the Courts of Scotland,’ section 1 of which provides that suits may be raised in the name and at the instance of or directed against Her Majesty’s Advocate for the time being. Petitions of Right in the Colonies and Dependencies are regulated by a number of Colonial Statutes and ordinances which are tabulated by Clode, App. B. In India suits against the Crown are brought against the Secretary of State in Council (Government of India Act, 1858 (21 & 22 Vict., c. 106), s. 65; *Doss v. Secretary of State for India in Council* (1875) L.R. 19 Eq. 509).

<sup>1</sup> For the details of the practice, see Robertson, *Civil Proceedings by and against the Crown*, Book III.

governs the initial stages of a Petition of Right by providing that

‘ The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty’s gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the Suppliant on so leaving such petition, or upon his receiving back the same.’

The practice is as follows. The Home Secretary, in order to qualify himself to advise the Crown whether the petition shall be allowed to proceed, forwards the petition to the department of state concerned—the Admiralty, War Office, or as the case may be, and obtains from such department a memorandum dealing with the questions raised in the petition. The petition and memorandum are then forwarded to the Law Officers of the Crown who advise whether the case is one in which a fiat ought to be granted.

Obviously the Home Secretary ought not capriciously to refuse to consider a petition,<sup>1</sup> although it has been doubted<sup>2</sup> whether in so improbable an event any legal remedy is available to the subject.<sup>3</sup>

<sup>1</sup> In *Ryves v. Duke of Wellington* (1846) 9 Beav. p. 600; 50 E.R. 475 (decided in 1846, before the passing of the Petitions of Right Act) Lord Langdale, M.R., says ‘ I am far from thinking that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a Petition of Right. The form of the application being, as it is said, to the grace and favour of the King affords no foundation for any such suggestion ’.

<sup>2</sup> In *re Mitchell* (1896) 13 T.L.R. 324.

<sup>3</sup> In Manning’s *Exchequer Practice* (1827) at p. 84 it is stated that the prayer of the Petition is granted *ex debito justitiæ*.

But if section 2 imposes upon the Home Secretary a duty to the Suppliant as well as to the Crown, it may be that the Courts would enforce it. An instance of an action in which damages were claimed against the Home Secretary for failing to submit a Petition of Right to the Crown is to be found in *Irwin v. Grey*,<sup>1</sup> in which the Home Secretary was called as a witness by the plaintiff and gave evidence that he had submitted the Petition, but had advised that a fiat be not granted. It was held that there was no case to go to the jury, and the action failed upon the facts.

The responsibility for advising the Crown whether a petition ought to be allowed to proceed rests with the law officers of the Crown, who are accountable to Parliament, and to Parliament alone, for such advice as they may tender. That the granting of a fiat remains an act of grace is clear from the wording of the section. 'It is said', says Erle, C. J., in *Tobin v. The Queen*,<sup>2</sup> 'that sect. 7 of 23 & 24 Vict., c. 34 applies, and that the legislature has taken away the Queen's prerogative and gives a right of action. I think that the words of the statute by no means justify that statement. The words of sect. 2, so far from giving the subject a right of action against the Queen absolutely, which every subject has who claims to have an action against a fellow-subject by suing out a writ, are as

This presumably refers to the granting of the *prayer* after the Suppliant has established his right by prosecuting his petition in the Courts. The statement in Chitty (*Prerog.*, p. 341) that 'a petition is the birth-right of the subject' cannot be taken literally.

<sup>1</sup> (1862) 3 F. & F. 635.

<sup>2</sup> (1863) As reported 32 L.J.C.P. at p. 221. The report in 14 C.B. (N.S.) at p. 521; 143 E.R. 549 is not so clear on this point.



follows (he then quotes part of the section). The prerogative is recognised and remains.’<sup>1</sup>

It may be urged that some restriction on the right to bring actions against the Crown is in accordance with public policy, and that in the absence of some form of control the Courts might be burdened with large numbers of actions in support of entirely unfounded claims. From this point of view the survival of the prerogative right of the Crown is not without its use as providing machinery for the elimination of frivolous proceedings. It has been said to exist ‘for the purpose of reconciling the dignity of the Crown and the rights of the subject, and to protect the latter against any injury arising from the rights of the former’.<sup>2</sup>

In practice it is extremely unlikely that a fiat would be refused in any case in which any real issue would fall to be determined. ‘Everybody knows’, says Bowen, L. J.,<sup>3</sup> ‘that that fiat is granted as a matter, I will not say of right, but as a matter of invariable grace by the Crown whenever there is a shadow of a claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous.’

<sup>1</sup> While the appeal in the Case was pending in the Court of Appeal and in the House of Lords the fiat to numerous Petitions of Right was refused on the ground that the decision in the Case would determine the legal rights of the several petitioners and would render it unnecessary that these petitions should proceed to trial. The refusal was not absolute, the granting of the fiat being merely suspended for the time being. Some of these petitions have received the fiat since the decision of the House of Lords in the Case. For the effect of the Indemnity Act (10 & 11 Geo. V, c. 48) see p. 158, *post*.

<sup>2</sup> Per Lord Cottenham, L. C., *Monckton v. Attorney-General* (1850) 2 Mac. & G. 402, 412; 42 E.R. 156, 160.

<sup>3</sup> *In re Nathan* (1884) 12 Q.B.D. 479.

If the procedure by Petition of Right were abolished, sufficient protection might perhaps be afforded by extending the jurisdiction of the High Court to stay actions which are frivolous or vexatious or which disclose no reasonable cause of action.<sup>1</sup>

### III

The Petitions of Right Act<sup>2</sup> relates purely to procedure and affords little, if any, assistance in determining the nature of the rights which form the proper subject-matter of a petition. The proviso to section 2 makes it clear that 'nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act'. 'Relief' is by sect. 16 declared to 'comprehend every species of relief claimed or prayed for in any such Petition of Right whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise', while the form of relief is to be by way of a Declaration of the Suppliant's right (sect. 9). The procedure under this section is therefore analogous to that which is provided under Order 25, rule 5, of the Rules of the Supreme Court in respect of declaratory judgments in actions between subjects.<sup>3</sup> The right

<sup>1</sup> Where a contract, the subject of a Petition of Right, contains a submission to arbitration; proceedings may be stayed under sect. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49) but a stay will not necessarily be granted at the instance of the Crown where a dispute involves an important constitutional question—*Anglo-Newfoundland Development Co. v. R.* (1920) 2 K.B. 214.

<sup>2</sup> 23 & 24 Vict., c. 34.

<sup>3</sup> Under this rule 'the Court may make binding declarations

having been declared, the Crown will cause effect to be given to it, while machinery is provided for the satisfaction by the Treasury of a judgment for any sum of money due, and for costs, upon the judgment being certified by one of the judges of the Court in which such petition shall have been prosecuted (sections 13 & 14).

While the procedure is now regulated by the Act of 1860, it is necessary, in order to ascertain whether any particular complaint can properly be prosecuted by means of that procedure, to inquire whether the category of claims which can form the subject-matter of a Petition of Right, embraces all causes of action which can be prosecuted as between subject and subject, or whether it is confined within narrower limits. That the ambit of the procedure is not wider than that which applies between subjects is clear, for the remedy is restricted to claims founded upon a legal cause of action.

of right whether any consequential relief is or could be claimed or not'. For the principles governing the granting of relief by way of declaration, which is a matter of discretion, see *Guaranty Trust Co. v. Hannay* (1915) 2 K.B. 536. The procedure enables an action to be brought against the Attorney-General as representing the Crown, and this offers an alternative (in certain cases) to proceeding by Petition of Right. It is apparently a condition that the rights of the Crown be not directly affected—*Dyson v. Attorney-General* (1911) 1 K.B. 410, following *Hodge v. Attorney-General* (1839) 3 Y. & C. Ex. 342. For an instance in which a declaration was obtained against an officer of a public department as defendant, the Attorney-General not being joined as a party, see *China Mutual Steam Navigation Co. v. Maclay* (1918) 1 K.B. 33. An action is, however, not maintainable against a servant of the Crown for a declaration as to the construction of a contract, for the reason that substantive relief can be only claimed against the Crown itself by Petition of Right—*Hosier v. Earl of Derby* (1918) 2 K.B. 671; see also *Bombay and Persia Steam Navigation Co., Ltd. v. Maclay*, *The Times*, July 15, 1920.

Thus in *Baron de Bode v. The Queen*,<sup>1</sup> in answer to a suggestion by Mr. Serjeant Manning that the proceeding by Petition of Right did not render it necessary for the Suppliant to show a legal right, and that it was sufficient for him to show that his claim was founded in justice, Maule, J. is reported to have observed that neither the Queen's Bench nor any other Court of Law administers justice in general; and that if the Suppliant's claim was not cognizable by the Queen's Bench in law, it might be that the Court had no power to give any judgment at all. Similarly in *Feather v. The Queen*<sup>2</sup> Lord Coleridge, C. J., says that 'the Petition of Right, unlike a petition addressed to the grace and favour of the sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding.' In this respect, the ambit of a Petition of Right is not wider than that which embraces actions between subjects. Thus a servant of the Crown, whether civil<sup>3</sup> or military,<sup>4</sup> who holds his office only during the pleasure of the Crown has no right of action, and a Petition of Right, even if allowed to proceed to trial, would be dismissed.

<sup>1</sup> (1848) 13 Q.B. 387 n.; 116 E.R. 1311 n.

<sup>2</sup> (1865) 6 B. & S. 295; 122 E.R. 1205.

<sup>3</sup> *Shenton v. Smith* (1895) A.C. 229; *De Dohsé v. The Queen* (1886) 66 L.J.Q.B. 422 n.; 3 T.L.R. 114; *Dunn v. The Queen* (1896) 1 Q.B. 116.

<sup>4</sup> *Mitchell v. The Queen* (1896) 1 Q.B. 121 n.; *Leaman v. The King* (1920) 36 T.L.R. 835.

If, then, a Petition of Right must be founded upon the assertion of a legal right, it follows that there may be cases in which the procedure is inapplicable because the Crown is not legally liable for acts which, if done by a subject, would give a good cause of action as between subject and subject. To this extent, the remedy by Petition of Right may be said to cover a more limited category of complaints than is open to a subject when suing a fellow subject. A familiar illustration of this limitation may be drawn from the fact that proceedings founded upon tort cannot be sustained against the Crown—a point which was finally decided in *Tobin v. The Queen*<sup>1</sup> after an exhaustive examination of the authorities. The principle that ‘the King can do no wrong’ does not merely relieve the sovereign from personal liability for a tort, but goes further. If the King can do no wrong, it follows that he cannot authorize a wrong. The maxim *respondeat superior* cannot, therefore, apply to transfer from an officer to the Crown liability for a tortious act done by such officer.<sup>2</sup> To say that a Petition of Right ‘does not lie’ in

<sup>1</sup> (1864) 16 C.B. (N.S.) 310; 143 E.R. 1148.

<sup>2</sup> See also *Feather v. The Queen* (1865) 6 B. & S. 257, per Cockburn, L. C. J., at p. 296, who points out that it does not follow that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. Instances in which damages have been recovered against a servant of the Crown who has acted without or in excess of his authority are numerous. See e. g. the litigation arising out of the issue of general warrants, *Money v. Leach* (1765) 19 How. St. Tr. 1001; 3 Burr. 1692, 1765; 97 E.R. 1050, 1075; 3 W. Blackst. 555; 96 E.R. 320; *Wilkes v. Wood* (1763) 19 How. St. Tr. 1153; Lofft 1; 98 E.R. 489; *Wilkes v. Lord Halifax* (1769) 19 How. St. Tr. 1076; *Entick v. Carrington* (1765) 19 How. St. Tr. 1030; 2 Wils. 275; 95 E.R. 807. The practice of the Crown to indemnify an officer against

respect of a tort is merely to affirm and illustrate the principle that inasmuch as no legal right of action arises against the Crown where the complaint is founded on tort, such a complaint is not one upon which a right to redress can be asserted by means of *any* form of legal procedure. If the procedure by Petition of Right were to be abolished, a subject complaining of a tortious act would be in no better position, for he would be unable to frame a cause of action against the Crown which the Courts would entertain. The exclusion of claims founded upon tort is not due to any arbitrary or inherent limitation upon the classes of cases to which the procedure by Petition of Right is applicable but to the fact that a ground of complaint which may give a good cause of action as between subjects does not necessarily disclose a cause of action against the Crown.

Apart from cases of tort, there is now little, if any, distinction between causes of action which may be prosecuted between subjects and causes of action which can properly form the subject of a Petition of Right ; but it is only in comparatively recent times that the absence of any such distinction has been definitely recognized, and the judgments in the case, as will be seen, contribute to its final obliteration.

A notion that a Petition of Right lies only in cases in which questions of title are in dispute, or at the most for the recovery of specific sums of money,

whom judgment is obtained, thereby securing to the Plaintiff the fruits of his judgment, may be illustrated by reference to collision cases in Admiralty in which a King's ship is involved. The Navigation officer is sued as defendant, the defence being undertaken by the Treasury-Solicitor—*H.M.S. Sans Pareil* (1900), P. 267.

or of chattels, was apparently entertained by the older text writers, and receives some support from the fact that there is until recent times an almost entire absence of claims founded upon contract. Staundford, writing in the year 1573,<sup>1</sup> says: 'Petition is all the remedy the subject hath when the King seizeth his lands or taketh away his goods from him, having no title by order of his laws so to do in which case the subject for his remedy is driven to sue unto his Sovereign by way of petition only, for other remedy hath he none.' Blackstone, writing nearly two hundred years later,<sup>2</sup> expresses himself in similar terms. Petition of Right 'is of use where the King is in full possession of the hereditaments or chattels and the party suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the Petition itself'.<sup>3</sup> In the early part of the nineteenth century it was recognized that the remedy by Petition of Right occupies a wider field. Thus Chitty, in his work on the Prerogative published in 1820, after quoting the passage already cited from Staundford, adds <sup>4</sup>: 'A Petition seems also to be the only remedy where a King does not pay a debt, as an annuity or wages, etc., due from him, or in the case of unliquidated damages occasioned by any breach of contract with the King himself; or in case the King, without any office, take or detain a subject's goods.' Manning <sup>5</sup> regards the Petition as 'in the nature of an action against the King, or of a writ of right against the party, though chattels real, or personal,

<sup>1</sup> *Praerog.*, c. xxii.

<sup>2</sup> The Commentaries were first published in 1765.

<sup>3</sup> *Comm.* iii. 256.

<sup>4</sup> p. 344.

<sup>5</sup> *Exchequer Practice* (1827), p. 84.

debts or unliquidated damages may be recovered under it'.

The fact that Petitions of Right were until recently confined almost exclusively to claims for the restitution of property is doubtless due to the practice under which money claims were not in fact prosecuted in the ordinary Courts of law, but were presented to the authorities of the Treasury, who secured that money claims, when properly authenticated were paid under the authority of Royal Warrants.<sup>1</sup> There was thus a special form of procedure for the payment of debts, initiated by petition, although not (in the technical sense) by a Petition of Right. If the claim was not disputed, authority to pay was given to the officials in the form of a writ of 'liberate' which issued under the Great Seal. Where the claim was referred for adjudication it was heard before the Treasurer and Barons of the Exchequer, whose ultimate endorsement of the petition constituted sufficient authority to the Treasury for payment. There being therefore a special procedure for the payment of claims presented to the Treasury the procedure by Petition of Right was limited to cases in which specific property was sought to be recovered from the Crown. The limited category of claims to which, according to Blackstone, it was appropriate in his time is thus explained.

It is a remarkable fact that the remedy by Petition of Right would appear to have remained dormant from about the year 1550 until about 1800, during which period there appear to be no recorded cases.<sup>2</sup> The explanation suggested by Clode is that the class of

<sup>1</sup> Clode, p. 21.

<sup>2</sup> Ibid., 65.



claims to which it was regarded as peculiarly applicable was in respect of property which came into the possession of the Crown through the working of the feudal system with its fines, forfeitures, and escheats. The greater proportion of this class of business came to be dealt with by alternative forms of procedure known as 'monstrans de droit' and 'traverse of office', while the little that remained was put an end to by the abolition of feudal tenures in the reign of Charles II. The revival is explained as being due 'not to any new necessity for a method of recovering land, but rather for some means by which contracts entered into by Crown agents for the supply of the public service could be enforced'.<sup>1</sup>

That a Petition of Right will lie for a breach of contract resulting in unliquidated damages was finally settled in 1874 by the Court of Queen's Bench in *Thomas v. The Queen*,<sup>2</sup> in which the judgment of the Court in favour of the subject on demurrer by the Crown was given by Blackburn, J., mainly on the authority of the *Bankers' Case*.<sup>3</sup> Judicial expressions of opinion that a Petition of Right will lie for breach of contract are to be found in modern cases dating from the beginning of the nineteenth century,<sup>4</sup> but it was not until

<sup>1</sup> Clode, p. 66.

<sup>2</sup> L.R. 10 Q.B. 31.

<sup>3</sup> (1700) 14 How. St. Tr. 1. Incomplete Reports are to be found in 5 Mod. 29; 87 E.R. 500; in Skinner, 601; 90 E.R. 270; and in 1 Freem. 331; 89 E.R. 246. It should be noted that the proceedings took the form of a petition to the Barons of the Exchequer and that one of the principal matters of controversy was whether the proper remedy was not by Petition of Right. For an analysis of the case, see the judgment of Blackburn, J., in *Thomas v. The Queen* at pp. 39 to 43.

<sup>4</sup> *Oldham v. Treasury Commissioners* (not reported) cited in *Ellis v. Earl Grey* (1833) 6 Sim. 214, 220; 58 E.R. 574, 576;

*Thomas v. The Queen*<sup>1</sup> came to be argued that the older authorities were considered in their direct bearing on the point. The decision has since been followed in numerous cases,<sup>2</sup> and the principle has now received statutory recognition in the Indemnity Act, 1920.<sup>3</sup> It is unnecessary, therefore, to discuss it in detail. Whether or not the case was rightly decided is now a matter merely of antiquarian interest, which may be gratified by reference to Clode's criticism.<sup>4</sup> The learned author of *Civil Proceedings by and against the Crown*,<sup>5</sup> while inclining to the view that the decision was wrong, suggests that had it been to the contrary a remedy must have been provided by legislation. The decision has been consistently followed, and having been twice approved by the Privy Council<sup>6</sup> has now been adopted by the House of Lords in the Judgments delivered in the Case.

*Baron de Bode v. The Queen* (1845) 8 Q.B. p. 274; 115 E.R. p. 879, in which Denman, L. C. J., expresses an unconquerable repugnance to the suggestion that the door ought to be closed against all redress and remedy. See also *Tobin v. The Queen* (1864) 16 C.B. (N.S.) 355; 143 E.R. 1165; *Feather v. The Queen* (1865) 6 B. & S. p. 294; 122 E.R. p. 1205; *Churchward v. The Queen* (1865) L.R. 103, 173. In *In re von Frantzius* (1858) 2 De G. & J. 126; 44 E.R. 936, no objection appears to have been taken on the ground that the claim was for unliquidated damages and the same observation applies to *Kirk v. The Queen* (1872) L.R. 14 Eq. 558. For an earlier dictum, see *Macbeath v. Haldemand* (1786) 1 Term Rep. 172, per Buller, J., at p. 176; 99 E.R. 1036, 1038.

<sup>1</sup> (1874) L.R. 10 Q.B. 31.

<sup>2</sup> See *Kirk v. The Queen* (1872) L.R. 14 Eq. 558; *R. v. Doutre* (1884) 9 A.C. 745; *Windsor and Annapolis Railway Co. v. The Queen* (1886) 11 A.C. 607.

<sup>3</sup> 10 & 11 Geo. V, c. 48, s. 1 (1) (b).

<sup>4</sup> Clode, p. 116.

<sup>5</sup> Robertson, p. 339.

<sup>6</sup> See note 2, *supra*.

## IV

In order to appreciate the full bearing of the Case upon the true scope of the procedure by Petition of Right, it is necessary to see precisely what the House of Lords decided. The judgments for the first time explain the nature of the legal right which arises out of a requisition of property for purposes of defence. The Suppliants' right did not rest upon any consensual foundation, for it was clear upon the facts that possession was taken *in invitum*. The parties having failed to agree upon the amount of compensation, the officers of the Crown threatened to take possession under the compulsory powers with which they claimed to be invested by law. Possession was in fact given by the Suppliants, acting as good citizens, in order that the authorities should not be hampered in the discharge of their duties in providing for the public safety and the Defence of the Realm, but the surrender was made under protest and under full reservation of the Suppliants' legal rights and remedies.

Clearly, if the possession had not been justified, the entry by the officers of the Crown would have been tortious, and would have involved the result that all remedy by Petition of Right would have been excluded, although the individual officers who authorized and carried out the taking of possession would have been personally liable in actions for damages.

But the necessity for taking possession was not disputed, the only controversy being with reference to compensation and to the amount. The act of taking was legal,<sup>1</sup> and indeed the Suppliants when

<sup>1</sup> Per Lord Dunedin, App. A, p. 169.

they alleged a right to compensation under the Defence Acts necessarily negatived any wrong done by the Crown.<sup>1</sup>

The notion of tort being excluded, the question next arose whether the Suppliants were entitled to rely on any right arising *ex contractu*. If it could be established that possession was taken by the Crown under circumstances from which an agreement to pay rent or compensation could be implied, the difficult questions which were involved in the assertion by the Suppliants of a right to compensation either by statute or at Common law would disappear, while the procedure by Petition of Right clearly covered a claim in the nature of damages arising out of a contract. It was accordingly submitted in the Petition by way of alternative contention that possession was taken by permission of the Suppliants, and that they were entitled to compensation on this ground by way of rent for use and occupation. Upon the view of the facts taken by the majority of the Court of Appeal this contention was held to be sound,<sup>2</sup> and the Suppliants were held entitled in that Court to succeed on this comparatively simple point.<sup>3</sup>

In presenting their argument in the House of Lords, this contention was abandoned by the Suppliants, it being recognized that in the circumstances no such consent was to be inferred as would justify the implication of any contractual relation,

<sup>1</sup> Per Lord Sumner, App. A, p. 198.

<sup>2</sup> (1919) 2 Ch. p. 227, per Swinfen-Eady, M. R.; per Warrington, L. J. p. 231.

<sup>3</sup> For a detailed examination of the authorities on the right to sue for use and occupation, see the judgment of Lord Atkinson, App. A, p. 178.

and the argument proceeded upon the footing that the taking amounted to a pure requisition independent of the consent of the Suppliants and inconsistent with any entry upon their land by their permission.

The claim of the Crown to take land free from a legal obligation to pay compensation so far as it was based on the alleged prerogative was, as has been seen, not established. Had the right to take the Suppliants' property depended upon powers of the Crown resting upon a prerogative at Common law the Suppliants would, it is submitted, have been entitled *ex jure* to compensation. But no decision was given founded on any right to compensation at Common law, and the Suppliants' right was held to depend upon statute under which the requisition was recognized as lawful, the notion of a liability on the part of the Crown arising *ex contractu* being expressly negatived.

How is such a right enforceable against the Crown? On what ground can it be said that a Petition of Right does not lie? That the Defence Act gives a legal right to the subject to have proper compensation assessed and paid is beyond dispute. It is equally clear that appropriate machinery exists as between subject and subject for enforcing the analogous statutory right of compulsory acquisition; as in the case of a corporation which has taken possession of land under statutory powers,<sup>1</sup> but declines to take the necessary proceedings for the assessment of compensation. The parties in such a case are not placed by the operation of

<sup>1</sup> As under section 85 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18).

a notice to treat in a contractual relationship, although their position is analogous to that of vendor and purchaser.<sup>1</sup> An owner is not entitled by the mere fact that his land has been taken under compulsory powers to be paid compensation; his right is to have the amount of compensation assessed, and that right can be enforced by mandamus.<sup>2</sup> The remedy by mandamus is not, however, applicable against the Crown.<sup>3</sup> The question therefore arises whether there be anything in the law governing the procedure by Petition of Right which would exclude a petition praying for a declaration that the Suppliant is entitled to compensation. The definition of the word 'relief' in section 16 of the Petitions of Right Act, 1860,<sup>4</sup> is in its terms sufficiently wide to cover a claim for such a declaration. The proviso to section 7 limits the remedy to such remedies as existed before the passing of the Act and would, no doubt, operate to exclude claims which could not before the passing of the Act form the subject-matter of a Petition of Right. But if the procedure by Petition of Right be applicable to all cases in which the subject is in a position to

<sup>1</sup> *Adams v. London and Blackwall Railway Co.* (1856) 2 Mac. & G. 118; 42 E.R. 46; *Haynes v. Haynes* (1861) 1 Drew & Sm. 426, 450; 62 E.R. 442, 451; *Harding v. Metropolitan Railway Co.* (1872) L.R. 7 Ch. 154; *Tiverton and North Devon Railway Co. v. Loosemore* (1884) 9 A.C. 480 at pp. 493, 511.

<sup>2</sup> *R. v. Birmingham and Oxford Junction Railway Co.* (1850) 15 Q.B. 634; 117 E.R. 599; *Tiverton and North Devon Railway Co. v. Loosemore* (1884) 9 A.C. p. 493; *R. v. London and North Western Railway Co.* (1894) 2 Q.B. 512.

<sup>3</sup> *In re Baron de Bode* (1838) 6 Dowl. 776; 1 W.W. & H. 332; *R. v. Powell* (1841) 1 Q.B. 352; 113 E.R. 1166; *R. v. Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387.

<sup>4</sup> 23 & 24 Vict., c. 24.

assert a legal right against the Crown, the absence of any instance in which that right was founded upon a statutory basis does not, it is submitted, preclude a subject from vindicating it by the only form of procedure which is open to him as against the Crown. Indeed, once it is established that a claim to compensation rests on a legal right it is difficult to formulate any principle upon which the remedy by Petition of Right ought to be excluded. 'I can see no valid distinction', says Lord Atkinson,<sup>1</sup> 'between a sum due under a contract or grant made on behalf of the Crown mentioned by Chief Justice Erle in *Tobin v. The Queen*,<sup>2</sup> and compensation due for the lawful and authorized use and enjoyment by the officer of the Sovereign on the Sovereign's behalf of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no wrong.'

And so Lord Dunedin<sup>3</sup> arrives at the conclusion that a Petition of Right will lie 'when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject'.<sup>4</sup>

<sup>1</sup> App. A, p. 189.

<sup>2</sup> (1864) 16 C.B. (N.S.) p. 355 ; 143 E.R. p. 1165.

<sup>3</sup> App. A, p. 176.

<sup>4</sup> For the effect of the Indemnity Act, 1920 (10 & 11 Vict., c. 48), see p. 158, *post*.

## EXCURSUS I

### NOTES ON THE RIGHT TO COMPENSATION IN RESPECT OF REQUISITIONED PROPERTY OTHER THAN LAND

THE right to requisition property other than land has not so far been tested in the light of historical evidence in any recent legal proceeding. The recent decisions of the Courts as regards chattels<sup>1</sup> and shipping<sup>2</sup> are founded upon the Defence of the Realm Acts and Regulations, no claim having been advanced by the Crown to Act under powers derived from the prerogative. The following notes have been compiled in support of the general proposition that, assuming an emergency which justifies the requisitioning of private property for the purposes of defence, the right to requisition is conditioned by an obligation to pay compensation.

<sup>1</sup> *Newcastle Breweries Limited v. The King* (1920) 1 K.B. 854.

<sup>2</sup> *China Mutual Steam Navigation Co. v. Maclay* (1918) 1 K.B. 33; *Hudson's Bay Co. v. Maclay* (1920) 36 T.L.R. 469. In *Russian Bank for Foreign Trade v. Excess Insurance Co.* (1918) 2 K.B. 123, Bailhache, J., expressed the opinion that the Admiralty had no authority to requisition ships otherwise than within the British Isles or the 'waters adjacent thereto. The point was not fully argued. On Appeal the Crown (which was not a party to the litigation) was prepared to vindicate the requisition as an exercise of the prerogative, but the Court held that it was unnecessary to decide this question (1919) 1 K.B. 39. The prerogative to requisition British ships was not disputed in *The Broadmayne* (1916), P. 64; *The Sarpen*, *ibid.*, 306. Requisitions of ships at present have statutory authority under the powers conferred by Defence of the Realm Regulation 39 B.B.B. on the Shipping Controller, as to whose office *vide* p. 103, *ante*, note 2.



## I

The duty to provide arms in early times was incidental to the obligation of personal service, which in itself was based mainly on tenure. But whatever the foundation of the obligation, this duty was from early times strictly regulated by statute. Thus the Statute of Winchester of 1285,<sup>1</sup> which provides that 'View of Arms be made', requires that every man have in his house harness 'for to keep the peace after the ancient Assize', that is to say that every man between fifty and sixty shall be assessed and sworn to armour according to the quantity of his lands and goods, the particulars of the arms and armour to be provided being set out according to the value of each man's property. A statute of Edward III<sup>2</sup> records the King's will that no man shall be charged to arm himself otherwise than he was wont in the time of his progenitors, Kings of England; and 'that no man shall be compelled to go out of his shire, but where necessity requireth, and sudden coming of strange enemies into the Realm, and then it shall be done as hath been used in times past for defence of the Realm'. Later in the same reign it is made clear<sup>3</sup> that no man shall be constrained to find men-at-arms, hoblers, or archers other than in accordance with their tenures, unless by common assent and grant made in Parliament; and these statutes were confirmed in the reign of Henry IV.<sup>4</sup> It is unnecessary to set out in

<sup>1</sup> 13 Edw. I, Stat. 2, c. 6.

<sup>2</sup> (1327) 1 Edw. III, Stat. 2, c. 5.

<sup>3</sup> (1356) 25 Edw. III, Stat. 5, c. 8.

<sup>4</sup> (1402) 4 Hen. IV, c. 13, confirming the statutes of 1327 and 1356, and also 18 Edw. III, Stat. 2, c. 7 (1344), which deals with purveyance and provides that men of arms, hoblers, and

detail the many enactments which dealt with the subject of military service, all of which were superseded in the reign of Philip and Mary by a consolidating statute of 1555,<sup>1</sup> which imposed on owners of land, according to their estates, an obligation to keep and sustain within the Realm horses and armour for defence. The obligation was therefore purely *ratione tenurae*, and did not survive the abolition of military tenures and purveyance in the time of the Commonwealth by the Act of 1660.<sup>2</sup> So far, then, as military equipment is concerned the right to demand it was incidental to the obligation of service which was intimately connected with the holding of land, or was imposed by Parliament as a tax upon property.

## II

The prerogative of purveyance, which was primarily exercisable in respect of provisions and

archers chosen to go in the King's service out of England shall be at the King's wages from the day that they depart out of the counties where they were chosen till their return.

<sup>1</sup> 4 & 5 Ph. & M., c. 2. This statute was repealed by a statute-law revision act of 1604 (1 Jac. I, c. 25, s. 46) and the repeal was relied on by the opponents of Charles I as reviving the earlier statutes. St. John in *R. v. Hampden* (3 How. St. Tr. 877) declines to discuss the question whether the earlier statutes were still in force in his day. They are enumerated in Rushworth, iii. 655-722, under the heading 'Commission of Array, the legality of it controverted and other passages relating to the putting it in execution'. The claim of Charles I to issue Commissions of array under powers alleged to have been conferred by statute in 5 Hen. IV (*Rot. Parl.* iii. 526) was one of the causes which led to the outbreak of the Civil War. For the Militia, as the constitutional force for the Defence of the Realm since the Restoration, see Clode, *Military Forces of the Crown*, c. iii; Bruce's Report, App. D, at p. 252.

<sup>2</sup> 12 Car. II, c. 24, s. 12.

transport, although it extended to such munitions of war as saltpetre for the making of gunpowder, was finally abolished by statute in 1660. The system, as has been shown,<sup>1</sup> extended to making provision for the needs of the King in time of war as well as to the supply of his domestic and personal requirements in time of peace. The statutes, in insisting upon the restriction of the exercise of the prerogative, were but giving effect to the principles of the Common Law that the King 'cannot alter the property of his subjects' goods except by consent of Parliament'.<sup>2</sup>

After the Restoration, the right of purveyance was revived in a limited form by an Act of 1661<sup>3</sup> 'for providing necessary carriages for His Majesty in his royal progress and removals'. The Act recites that the Act of 1660 'may prove very prejudicial and inconvenient to the King's Majesty in his Royal Progresses upon his necessary occasions to several parts of this Realm, in case any person or persons shall obstinately refuse voluntarily to provide sufficient carriages for royal service at ordinary and usual rates for such carriages as are paid by others of his subjects in such places, contrary to the true intent and meaning of the said Act'. Provision is accordingly made empowering the clerk or officer of the King's carriages by warrant from the Board of Green Cloth to provide carts and carriages for his Majesty's use. Penalties are imposed for refusal to provide what is required, but no horse or carriage is to be requisitioned for more than a day's journey, and payment is to be in ready money.

<sup>1</sup> *Ante*, p. 52.

<sup>2</sup> *St. John, arguendo, R. v. Hampden* (1637) 3 How. St. Tr. 881.

<sup>3</sup> 13 Car. II, Stat. i, c. 8, s. 2. Repealed by Statute Law Revision Act, 1863 (26 & 27 Vict., c. 125).

In 1662<sup>1</sup> was passed the first of a series of statutes, the modern counterpart of which is to be found in the Army Act, 1881,<sup>2</sup> as annually re-enacted, by which the naval and military authorities were authorized to resort to impressment for the purpose of obtaining transport. By an Act<sup>1</sup> of that year for providing carriage by land and by water 'for the use of His Majesty's Navy and Ordnance' it was provided that as often as the service of the Navy or Ordnance should require carriages might be impressed under the hand and seal of the Lord High Admiral or of certain specified officers, directed to two or more justices of the peace, who were to issue their warrants accordingly, at rates of hire which are set out in the act, to be paid in ready money. Similar powers are given to impress or take up ships, hoys, lighters, boats, or any vessel as should be necessary, the owners to receive hire, according to the rates usually paid by merchants from time to time and in the absence of agreement to be settled by the Brotherhood of Trinity House.

The Act was to remain in force until the end of the first session of the next Parliament. It was revived in 1685<sup>3</sup> for seven years and continued by successive Acts of 1692<sup>4</sup> and 1698-9,<sup>5</sup> until it finally expired in 1707. It is to be observed that these Acts (of which the Acts of 1692<sup>4</sup> and 1698-9<sup>5</sup> were passed in time of war) gave power only to requisition transport. The right of impressment is confined to making provision for the King's Progresses

<sup>1</sup> 14 Car. II, c. 20, App. B, p. 222, *post*.

<sup>2</sup> 44 & 45 Vict., c. 58.

<sup>3</sup> 1 Jac. II, c. 11, App. B, p. 228, *post*.

<sup>4</sup> 4 Will. & M., c. 24.

<sup>5</sup> 11 Will. III, c. 13 (11 & 12 Will. III, Ruff.).

and for the necessities of the Navy and Ordnance. Impressment for the transport of troops was not authorized by statute until 1692 when similar powers were given to justices of the peace, when authorized by Royal Order, under section 27 of the Mutiny Act of that year.<sup>1</sup> These Acts contain no reference to any right to requisition victuals, forage, or any other articles, and indeed the Mutiny Act of 1692, which was passed in time of war (the right of billeting troops is expressly limited to the duration of the war) provides in terms for the purchase of clothes, arms, and accoutrements of war, which are to be bought only in England, Wales, and the town of Berwick and not elsewhere, but contains no suggestion of purchase under compulsory powers. Similar provisions are found in the annual Mutiny Acts, which, although passed primarily in order to render legal the maintenance of a standing force in time of peace, notwithstanding the provisions of the Bill of Rights, were passed annually (with a tendency to increase in length) until 1879, when the Act<sup>2</sup> upon which is founded the Army Act of 1881 (now re-enacted annually with such amendments as may be necessary), came into force.

Passing to the time of the Napoleonic wars, it

<sup>1</sup> 4 Will. & M., c. 13. The first Mutiny Act (1 Will. & M., c. 5) had been passed before the Bill of Rights (1 Will. & M., Sess. 2, c. 2) to deal with the mutiny at Ipswich and the troops favourable to James I who were to be shipped to the Low Countries. The Act merely provided for the punishment of mutiny and sedition in the army by courts-martial, and for the constitution of such courts, while enacting that nothing in the Act should exempt any officer or soldier from the ordinary process of law. More elaborate provisions are contained in the Acts of 1689 (1 Will. & M., Sess. 2, c. 4) and 1690 (2 Will. & M., Sess. 2, c. 6).

<sup>2</sup> Army Discipline and Regulation Act, 1879 (42 & 43 Vict.), c. 33.

should be noted that the annual Mutiny Acts contained provisions for the taking up of transport for the conveyance of troops on the march, following the general lines of the Act of 1692. The power to requisition transport is entrusted, under these Acts <sup>1</sup> not to the military, but to the civil power. The concurrent legislation embodied in the Defence Act of 1798 <sup>2</sup> (and re-enacted in the Act of 1803 <sup>3</sup>) covers a wider field. Section 1 provides that the County and Deputy Lieutenants shall procure returns of (*inter alia*):

‘ all boats, Barges, Waggon, Carts, Horses, and other Cattle and Sheep, and of all Hay, Straw, Corn, Meal, Flour, and other Provisions, and of all Mills and Ovens, and all other Matters and Things which may be useful to an enemy, or applicable to the Public Service, within the said Counties, Ridings, Stewartries, Cities, and Places respectively and which of such Boats, Barges, Waggon, Carts, and Horses the owners thereof are willing to furnish, in case of Emergency, for the public Service, either gratuitously or for Hire, and with what Number of Boatmen, Bargemen, Drivers, and other necessary Attendants, and upon what Terms and Conditions, and of all such other Particulars as his Majesty shall require, for the Purpose of enabling his Majesty, and the persons acting under his Majesty’s Authority to give such orders as may be necessary for the Removal, in case of Danger, of such persons as shall be incapable of removing themselves, and for the Removal

<sup>1</sup> See the Acts of 1798 (38 Geo. III, c. 23), s. 45, and of 1801, (41 Geo. III, c. 11), s. 45. Section 46 of the latter Act contains provisions for the requisition in cases of emergency of horses, carriages, and of vessels used on canals and navigable rivers similar to those which are now included in section 115 of the Army Act, 1881.

<sup>2</sup> 38 Geo. III, c. 27.

<sup>3</sup> 43 Geo. III, c. 55.

of all Boats, Barges, Waggon, Carts, Horses, Cattle, Sheep, Hay, Straw, Corn, Meal, Flour, and other Provisions, Matters, and things aforesaid, or for the Employment thereof in his Majesty's service, or otherwise, as the Exigency of the Case shall require, and generally to give such Directions touching such matters respectively, as may be deemed most likely to defeat the Views of the Enemy, and most advantageous for the public Service.'

Section 7 provides that :

'It shall be lawful for his Majesty, in case of actual Invasion of this Kingdom, or if his Majesty shall see special Cause to apprehend that such Invasion will be actually attempted by the Enemy, to authorize and empower by Order under his Sign Manual, the said Lieutenants and Deputy Lieutenants, or any of them, on any Emergency, and on the Requisition of the Officer commanding within the District respectively or of such other Persons as his Majesty shall specially empower to make such Requisition, to give all such Orders as shall be necessary for the Removal of any Boats, Barges, Waggon, Carts, or other Carriages, Horses, Cattle, Sheep, Hay, Straw, Corn, Meal, Flour, or Provisions of any Kind or any other Things which may be of advantage to an Enemy, or useful for the public Service, and to take the same, if necessary, for the public Service, and also to give such orders as shall be necessary for the Removal of the Inhabitants of any House, Hamlet, District, or Place, or any of them, and especially such as by reason of Infancy, Age, or Infirmary, or other Cause, shall be incapable of removing themselves in Case of Danger : and also, in case of Necessity, to destroy any Boats, Barges, Waggon, Carts, or other Carriages, Horses, Cattle, Sheep, Hay, Straw, Corn, Meal, Flour, or Provisions of any Kind, or any Thing

which may be of Advantage to an Enemy ; and to remove, destroy, or render useless, any House, Mill, Bridge, or other Building, or any Matter or thing whatsoever ; and generally to do and act in the premises as the public Service and the Exigencies of particular Cases shall require.’

The assessment of Compensation is dealt with by section 11, as follows :

‘ That when it shall have been found necessary to take, for the public Service, remove, or destroy, any Waggon, Carts, or other Carriages, Horses, Cattle, Sheep, Hay, Straw, Corn, Meal, Flour, or other Provisions, or any other Articles whatsoever, or to destroy or injure any House, Mill, Bridge, or other Buildings, or any Matter or Thing of Value, under the Directions aforesaid, the Commissioners of his Majesty’s Treasury shall appoint persons to inquire into and ascertain the Value of such Articles, and the Compensation which ought to be made for the same, by way of Purchase or Hire, or Recompence for Damage, or otherwise, according to the Nature of the Case ; and if the Owner or Owners, or Person or Persons interested, shall be willing to accept the Compensation which shall be so ascertained, the same shall be paid by the said Commissioners of his Majesty’s Treasury or such Person or Persons as shall be appointed by them for that Purpose, in pursuance of a Certificate under the Hands of the Persons so employed to ascertain the same, and if the Owner or Owners, or Person or Persons interested shall not be willing to accept such Compensation, it shall be lawful for his Majesty to order two Justices of the Peace of the County, Riding, Stewartry, City, or Place, to settle and ascertain the Compensation which ought to be made to such Owner or Owners, or Persons interested ; which Justices shall settle and ascertain the same accordingly, and shall grant a Certificate thereof



to the Commissioners of his Majesty's Treasury who shall order the same to be paid to the Person or Persons entitled thereto, out of any Money granted for the Supply of the Year.'

During the Napoleonic wars it is, therefore, clear that the right to payment for the requisitioning of chattels was expressly secured by statute.

The Army Act, 1881,<sup>1</sup> gives no general power to requisition chattels, but follows the lines, in regard to the impressment of transport, of the Mutiny Acts, upon which it is based. The provision of transport is entrusted to the civil power, the duty of impressing carriages and horses being delegated to the justices of the peace.<sup>2</sup> The right of impressment is limited to the provision of transport of regimental baggage and stores, to be moved in accordance with a route issued to commanding officers of regular forces. In cases of emergency (to be certified by a Secretary of State) a general or field officer may be authorized to requisition carriages and animals, whether for the purpose of carriage or haulage, 'and also vessels (whether boats, barges, or other) used for the transport of any commodities whatsoever upon any canal or navigable river.'<sup>3</sup> Payment for regimental transport under section 112 is to be at the rates set out in the third schedule to the Act, subject to temporary

<sup>1</sup> 44 & 45 Vict., c. 58. Instructions to prepare a bill were first given to Lord Thring in 1867. The various stages in the discussion and preparation of the measure are described by the draughtsman in his *Practical Legislation* at p. 9. The papers written to explain the law alone fill a folio volume of 1,067 printed pages.

<sup>2</sup> s. 112. Aircraft were first included under the Army (Annual) Act, 1913 (3 Geo. V, c. 2).

<sup>3</sup> s. 115. Extended to the Naval authorities by the Naval Billeting Act, 1914 (4 & 5 Geo. V, c. 70).

increases to be assessed, if necessary, by the authorities specified in section 113. Transport requisitioned in cases of emergency is to be paid for by the Army Council, the amount being referred, in cases of dispute, to the County Court.<sup>1</sup>

The right to impress chattels is conferred by the Army (Supply of Food, Forage, and Stores) Act, 1914,<sup>2</sup> which received the Royal Assent on August 7, 1914, three days after the outbreak of war. These increased powers are conferred by the insertion in section 113 (2) of the Army Act, of the words 'and also of food, forage, and stores of every description'. The jurisdiction of the County Court is preserved and its exercise regulated by section 3 (1) of the Army (Amendment) Act, 1915,<sup>3</sup> and by the provisions for determining the amount to be paid contained in the schedule to that Act. The basis of assessment laid down by Clause 3 of the Schedule is the fair market value of the article requisitioned on the day on which it was required to be furnished as between a willing buyer and a willing seller. Under Section 1 the decision of a County Court Judge is directed to be final.

It is hardly necessary to enlarge upon the importance of these regulations as illustrating the application of fundamental constitutional principles in the exercise of the right of requisition. The right itself is conferred by statute. The obligation to make full compensation, not as a matter of grace, but as

<sup>1</sup> s. 115 (4).

<sup>2</sup> 4 & 5 Geo. V, c. 26.

<sup>3</sup> 5 Geo. V, c. 26. A full list of amendments consequential on the Army (Supply of Food, Forage, and Stores) Act, 1914, is contained in the Schedule to the Army (Amendment), No. 2, Act, 1915 (5 & 6 Geo. V, c. 58).

of right, is expressly recognized. In so far as the subject's right to free access to the Courts is restricted by the withdrawal of the ordinary right of appeal, this restriction is imposed by the direct authority of Parliament, while the whole machinery for ascertaining the amount of compensation as well as the basis of assessment is the subject of specific statutory provision. In regard to requisitions of chattels for the use of the military forces, Regulation 2 B, made under the authority of the Defence of the Realm Acts, which formed the subject of the discussion in *Newcastle Breweries Limited v. The King*<sup>1</sup> seems in direct conflict with these statutory provisions, and was in that case held to be *ultra vires*. But the fact that in the case of chattels required for the use of the military forces, the method of requisition is prescribed in detail under direct Parliamentary authority points to a recognition by Parliament in the early days of the war of the principle enunciated by Sir George Crooke in the *Case of Ship-money*<sup>2</sup> that the Common Law 'gives a man a freedom and property in his goods and estate that it cannot be taken from him but by his consent in specie, as in Parliament, or by his particular assent'.<sup>3</sup>

<sup>1</sup> (1920) 1 K. B. 854.

<sup>2</sup> 3 How. St. Tr. p. 1129.

<sup>3</sup> A further instance in which Parliament by direct action restricted the right of the subject to use his property as he chooses, free from interference, is to be found in the Unreasonable Withholding of Food Supplies Act, 1914 (4 & 5 Geo. V, c. 51) repealed and superseded by the Articles of Commerce (Returns) Act, 1914 (4 & 5 Geo. V, c. 65) which gives power to the Board of Trade to take possession of articles of commerce unreasonably withheld from market, subject to an obligation to pay such price as may, in default of agreement, be decided to be reasonable, having regard to all the circumstances of the case, by the arbitra-

## III

That the practice of requisitioning ships prevailed generally until the Restoration in 1660 admits of no doubt.<sup>1</sup> To a great extent the obligation to supply vessels rested upon the foundation of tenure; the maritime towns, and more particularly the Cinque Ports,<sup>2</sup> holding their franchises on condition that they should provide a quota of ships<sup>3</sup> (and in some cases money)<sup>4</sup> for the King's service. But innumerable instances may be cited in which ships, both British and foreign, were 'stayed' or 'arrested' when required, independently of any obligation founded on tenure or on contract.<sup>5</sup> That provision was made for payment is equally clear, the proceeds of such taxes as the grand customs of the mark and demy-mark; upon wool, wood-fells, and leather; tonnage and poundage; and the petty customs, as well as aids granted on particular occasions, being specifically allocated to the sea-service.<sup>6</sup>

The right to payment was constantly asserted by Parliament and acknowledged by the King.

tion of a Judge of the High Court selected by the Lord Chief Justice in England (in Scotland by a judge of the Court of Session selected by the Lord President, and in Ireland by a Judge of the High Court of Ireland selected by the Lord Chief Justice of Ireland). The Act is not repealed by or referred to in the New Ministries and Secretaries Act, 1916 (6 & 7 Geo. V, c. 68).

<sup>1</sup> Numerous instances are referred to in Professor Holdsworth's learned essay on 'The Power of the Crown to requisition British ships in a National Emergency', 35 *L. Q. R.* 12.

<sup>2</sup> For a general account of which see Burrows, *The Cinque Ports*, London, 1892.

<sup>3</sup> See instances cited *R. v. Hampden* (1637) 3 How. St. Tr. 869, 870.

<sup>4</sup> As in the cases of Lewes and Colehester, *ibid.*, 869.

<sup>5</sup> See Professor Holdsworth's essay, *passim*.

<sup>6</sup> 3 How. St. Tr. 874.

Thus in 1372, a petition of the Commons<sup>1</sup> complains of the decline of 'La Navie' (namely of merchant shipping) the principal cause being 'the long "arrest" often made in times of war; that is to say a quarter of a year or more before they have passed from their ports without obtaining anything for the wages of their mariners during that time, the masters receiving no reward for the furnishing of their ships.' The royal answer is equivocal. 'La Navie' is to be maintained and preserved 'a greindre ease et profit que faire se poet'. This complaint appears to be directed rather to the loss suffered by the detention of vessels in port while awaiting orders to sail, than to the withholding of payment while on active service. A similar complaint in the following year<sup>2</sup> concludes with a prayer that payment be made from the time of 'arrest' until the end of their voyage and calls forth a definite admission, that ships are only to be arrested when necessary; and reasonable payment is to be made.

A definite rate of hire is claimed in 1385 as having formerly been ordained,<sup>3</sup> and the King assents to a payment of two shillings every quarter for each tun-tyght<sup>4</sup> until the next Parliament. In 1415<sup>5</sup> complaint is made that in the time of the King's predecessors it was accustomed and ordained, that when the ships of the Kingdom were doing their service in war or otherwise, owners should have their

<sup>1</sup> *Rot. Parl.* 46 Edw. III (vol. ii, p. 311), App. G, p. 296, *post*.

<sup>2</sup> *Rot. Parl.* 47 Edw. III (vol. ii, p. 319), App. G, p. 297, *post*.  
See also (1379) *Rot. Parl.* 2 Ric. II (vol. iii, p. 66), App. G, p. 297, *post*; (1402) *Rot. Parl.* 4 Hen. IV (vol. iii, p. 501), App. G, p. 298, *post*.

<sup>3</sup> *Rot. Parl.* 9 Ric. II (vol. iii, p. 212), App. G, p. 298, *post*.

<sup>4</sup> This word probably means complete or measured tons.  
See Oppenheim, *Administration of the Royal Navy*, p. 8, note (2).

<sup>5</sup> *Rot. Parl.* 3 Hen. V (vol. iv, p. 79), App. G, p. 299, *post*.

'tonnage' on the said ships, as well as the wages of the mariners, which are set out, and that this tonnage has been duly and loyally paid from time to which memory runneth not to the contrary until the time of the King's father. The Royal answer is that the King will have that done which right and reason demand. In 1442<sup>1</sup> a statute provides that 'purveyance be made to have on the sea continually from Candlemas to Martinmas eight ships with forestages each attended by a barge and a balinger,<sup>2</sup> and manned by 150 men, together with four spynes.' The rates of hire and of pay are fully set out and the ships which are to be impressed are named, together with the ports where they are to be found, and in many cases the owners.

These early statutes, therefore, recognize the right to impress ships, while insisting upon an obligation on the part of the Crown to pay for the services rendered. The exercise of the right of impressment may be illustrated from the enormous number of writs and the Commissions to Admirals which were issued from time to time. Many of these documents contain no reference to payment, but it is submitted that the right to compensation is to be implied from the earlier statutes, while instances of express directions to make compensation are not uncommon. Thus a commission<sup>3</sup> of Elizabeth (in whose time

<sup>1</sup> *Rot. Parl.*, 20 Hen. VI (vol. v, p. 59), App. G, p. 300 *post*.

<sup>2</sup> Spanish, *ballenere*, long low vessels for oar and sails introduced in the fourteenth century by the Biscayan Builders. Oppenheim, *op. cit.*, p. 13, note (2).

<sup>3</sup> Rymer, *Foedera* (ed. 1742), vol. vii, pt. i, p. 219. This commission is printed in Prothero, *Statutes and Constitutional Documents*, p. 163. Two later commissions of James I (Rymer, vol. vii, pt. iii, pp. 86, 221) omit all reference to payment, as is to be expected at this period.

the regular Navy had attained substantial proportions) in 1599 appointing Thomas, Lord Howard de Walden 'to be our Lieutenant and Captain General, leader, governor, and admiral of our said navy and forces therein serving which we have set to the seas for the defence of our Realm and people against the Spaniard' directs that :

'forasmuch as it may be needed for our service to take up vessels and other material for the use of our service, we do hereby give full authority to the said Thomas to direct his warrants to our treasurer of our navy or to his deputy in his absence to make payment of all such sums of money as he the said Thomas shall find necessary to direct him to lay out in which case the warrant of our said admiral shall be to our said treasurer or his deputy sufficient discharge upon the making of his account.'

In Stuart times, the right to requisition vessels was admitted by St. John in his argument in the *Case of Ship-money*, subject to certain qualifications. The issue was not whether the Crown had the right to requisition ships, but whether the imposition of a tax in terms of the Writ could be justified. In the course of his argument he sets forth the constitutional means by which provision is made for the sea-service,<sup>1</sup> in support of his general proposition that the property of the subject cannot be taken without the consent of Parliament, unless it be *tempore belli*, that is to say when in the agony of invasion Parliament is not sitting and the Courts are closed.<sup>2</sup> The right to compensation is expressly asserted by another sixteenth-century lawyer whose reputation is not inferior to that of St. John. Selden

<sup>1</sup> 3 How. St. Tr. 869.

<sup>2</sup> *Ante*, p. 64.

in his *Mare Clausum*, published in 1635, two years before the argument in the *Case of Ship-money*, republished in 1652 in English under the title of *The Dominion of the Sea*, asserts:<sup>1</sup>

‘But what has been alleged about the staying of ships and lifting them for the King’s service you are always to understand it was so done according to equity that competent pay was to be allowed them answerable to the proportion of tons and also to the number of seamen that were so taken into employment. Touching which particular, there are several Testimonies also to be found in the *Records of Parliament*.’

In support of this proposition he refers to the statute of 3 Hen. V,<sup>2</sup> already cited. The same view is expressed a century later by Sir Michael Foster in his ‘discourse’ to the jury in *Rex v. Broadfoot*,<sup>3</sup> on the subject of the right of impressment, which, although directed mainly to the subject of impressment of sailors, contains a number of references to the impressment of ships, and cites a large number of commissions to Admirals. ‘Though the affair of pressing ships is not now before me, yet I could not well avoid mentioning it because many of the precedents I have met with and must cite go as well to that, as to the business of pressing mariners, and taken together, they serve to show the power the Crown has constantly exercised over the whole naval force of the Kingdom, as well shipping as mariners, whenever the public service required it. This, however, must be observed, that no man served the Crown in either case at his own expense.

<sup>1</sup> *Dominion of the Sea*, p. 352.

<sup>2</sup> *Rot. Parl.*, iv. 79, App. G, p. 299, *post*.

<sup>3</sup> (1743) Foster, *Crown Cases*, 154.



Masters and mariners received full wages, and owners were constantly paid a full freight.<sup>1</sup>

The effect of the statute by which purveyance was abolished,<sup>2</sup> and of the Act of 1662<sup>3</sup> with its subsequent re-enactments is not free from difficulty. Professor Holdsworth<sup>4</sup> is of opinion that the prerogative to requisition ships is not affected by these statutes, on the ground that 'the power to requisition with which they deal refers not to the power of requisition for purposes of national defence, but to the power which was in the nature of the power of purveyance abolished by the Act of 1660 to requisition for other purposes'. He points out that inasmuch as the Crown had the power, in the

<sup>1</sup> Ibid., p. 160. 'This prerogative, which has been much attacked and is certainly a blot on English freedom, is founded on immemorial usage, recognized, admitted, and sanctioned by various Act of Parliament,' Chitty, *Prerogative*, p. 47. For cases recognizing the legality of impressment of mariners, see *R. v. King* (1694) Comb. 245; 90 E.R. 456; *Ex parte Fox* (1793) 5 T.R. 276; 101 E.R. 155; and *R. v. Tubbs* (1776) 2 Cowp. 512; 98 E.R. 1215. In *R. v. Tubbs* the return to a Habeas Corpus was held insufficient and the men discharged 'upon their promise to go into His Majesty's Service after three weeks respite'. In *R. v. Tubbs*, it is said that the right is founded on immemorial usage, and that there may be a legal right of exemption upon the same foundation. A usage exempting from impressment men admitted as watermen of the City of London to attend upon the Lord Mayor and Aldermen was held not proved. Similarly in *Ex parte Fox* a sea-faring man holding the office of headborough was held not to be exempt. For instances of statutory recognition of the right, see 13 Geo. II, c. 17 (exemption of certain seamen and apprentices); and 38 Geo. III, c. 46 (relating to apprentices and fishermen who were exempt under earlier statutes). It has never been suggested that men pressed for the service were not entitled to be paid.

<sup>2</sup> (1660) 12 Car. II, c. 24.

<sup>3</sup> *Ante*, p. 140.

<sup>4</sup> 35 *L. Q. R.*, p. 32.

Middle Ages, to requisition for both purposes, there was no need to distinguish the powers, but that the distinction became apparent as the result of these statutes, which are not referred to when ships are requisitioned for other purposes. Whether or not Professor Holdsworth's conclusion be justified, his researches are directed rather to the legality of impressment of ships than to the question whether the exercise of the right involves an obligation of payment. As illustrating his argument he cites an Admiralty Order in Council of 1691, which recites the Act of 1685 and provides for the taking up of ships for the carriage of provisions and stores to the plantations in the West Indies. At this time England was at war with France, and the requisitions made under the statute were (and were expressed to be) subject to an obligation of payment. The illustrations cited in which no reference is made to statutory powers cover a period from 1676 to 1689. In 1676 the commander of a ship ordered to proceed to Virginia to assist in suppressing a Rebellion is authorized 'to have or otherwise imprest and take up in Virginia any one or more ships, vessels, boats, and what seamen shall be needful for the manning of the same, for the performance of any service which shall be judged by him to be requisite for the suppression of the Rebellion, he paying for the same upon the place out of the contingent money to be appointed for that service'. The remaining instances cited by Professor Holdsworth contain no express provision for payment. He points out that the practice of requisitioning ships gradually ceased, and that though barges and hoys were requisitioned, the warrants tend in general to relate only to the pressing of men.

In the period of the Napoleonic wars, sea-going vessels were not requisitioned. *China Mutual Steam Navigation Co. v. Maclay*<sup>1</sup> was not decided upon the prerogative, but the plaintiffs adduced evidence<sup>2</sup> (which was not contradicted or even challenged in cross-examination) to the effect that all vessels taken up by the Government were in fact chartered in the open market. Until 1794 ships were procured both for the Army and Navy by the Navy Board; after that date the requirements were provided for by a separate Transport Board. No indication was found of the use of compulsory powers, while ships were constantly being offered by brokers and owners. Both Boards operated through agents, generally naval officers, stationed at the ports, whose duties were defined by printed regulations which include instructions that when an order for a ship is received from any proper authority, the agent is to take pains to obtain a ship as cheaply as possible, and as near as possible to the terms of the charter parties made out in the Transport Office. No proclamation requisitioning ships was found in any list of Proclamations either during the Napoleonic wars or at any later period. In fact, therefore, no requisitions of ships were made during the Napoleonic wars either under Common Law powers or under any powers conferred by the Defence Act of 1795 and of 1803.

<sup>1</sup> (1918) 1 K.B. 33.

<sup>2</sup> The evidence was given by Marcus Slade, Esq., of the Inner Temple, who had made a search at the Record Office for that purpose.

## IV

The right to requisition ships was asserted at the outbreak of war in 1914 by a Royal Proclamation<sup>1</sup> 'for authorizing the Lords Commissioners of the Admiralty to requisition any British ship or British vessel within the British Isles or the waters adjacent thereto'. The proclamation is in the following terms :

'Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests :

And whereas the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxiliaries for the convenience of the Fleet and other similar services but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon :

Now, therefore, we authorize and empower the Lords Commissioners of the Admiralty by warrant under the hand of their Secretary or under the hand of any Flag Officer of the Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles or the waters adjacent thereto, for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners

<sup>1</sup> *Manual of Emergency Legislation*, p. 387.

of the Admiralty and the owners or failing such agreement by the Award of a Board of Arbitration to be constituted and appointed by Us for this purpose.'

•The Proclamation, which was not issued under statutory powers, while asserting a right to requisition ships, recognizes the principle that the rates of hire are a matter for negotiation and agreement. Standard rates of hire as well as standard forms of charter-party were settled in the early days of the war by sub-committees appointed to deal with liners, cargo-steamers and other classes of vessels.<sup>1</sup> The right to requisition ships 'in order that they may be used in the manner best suited to the needs of the country' has since been expressly conferred on the Shipping Controller by Regulation 39 B.B.B. of the Defence of the Realm Regulations.<sup>2</sup> The power of the Shipping Controller to requisition vessels for this purpose, as distinguished from his right to control the movements of ships or to regulate the rates of freight has not, so far, been challenged in the Courts.

<sup>1</sup> The Reports, under which what are known as 'Admiralty blue-book rates' were fixed, have been printed, but are not on sale by the Government printers.

<sup>2</sup> *Ante*, p. 99.

## EXCURSUS II

### THE INDEMNITY ACT, 1920

AT the time when judgment was given by the House of Lords in the Case there had been introduced in Parliament a Bill which, after considerable discussion and amendment in both Houses and before a select committee of the House of Commons, received the Royal Assent on August 16, 1920, under the title of the Indemnity Act, 1920.<sup>1</sup>

The Act materially affects the legal obligations of the Crown to the subject in respect of claims arising out of the war. As a precedent for future legislation, the Act is of importance—sinister or benevolent—according to individual views of the ethical considerations by which its effect upon established constitutional rights may be either deprecated or justified.

While embodying the features hitherto associated with Acts of Indemnity, the Act contains much that is novel in the history of our legislation. ‘An Act of Indemnity’, says Professor Dicey,<sup>2</sup> ‘is a statute, the object of which is to make legal transactions which when they took place were illegal, or to free individuals to whom the statute applies from liability for having broken the law.’ Such enactments, he observes, being as it were the legalization of illegality are the highest exertion of the sovereign power wielded by Parliament,<sup>3</sup> and ‘afford the

<sup>1</sup> 10 & 11 Geo. V, c. 48.

<sup>2</sup> *Law of the Constitution* (8th ed.), pp. 47, 547.

<sup>3</sup> *Ibid.*, p. 48. See also Maitland, *Constitutional History*, p. 386.

practical solution of the problem which perplexed the statemanship of the sixteenth and seventeenth centuries, how to combine the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which under some shape or other, must at critical junctures be wielded by the executive government of every civilized country'.<sup>1</sup>

Numerous instances of Acts of this character are to be found in the statutes which have followed the suspension from time to time of the Habeas Corpus Acts,<sup>2</sup> with the usual concomitant of detention by the executive of suspected persons without trial. Many cases suggest themselves in which servants of the Crown in times of national emergency may have committed acts which, although clearly done in the public interest, were either illegal or at all events of doubtful legality. The form taken by Acts of Indemnity in the past has been to relieve from the legal consequences of their action such persons as may have incurred liability to individuals. This traditional object of an Act of Indemnity is one of the two principal provisions contained in section 1 of the Act of 1920, subsection 1 of which, provides that :

‘ No action or other legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done, whether within or without His Majesty’s Dominions, during the war <sup>3</sup> before the passing of this Act, if done in good faith,

<sup>1</sup> Ibid., p. 48.

<sup>2</sup> See for example 34 Geo. III, c. 54 (1794) annually re-enacted until 1801, and the Act of Indemnity (41 Geo. III, c. 66) passed in the latter year.

<sup>3</sup> Defined by section 7 (3).

and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, or for the enforcement of discipline, or otherwise in the public interest, by a person holding office under or employed in the service of the Crown in any capacity, whether naval, military, air-force or civil, or by any other person acting under the authority of a person so holding office or so employed; and, if any such proceeding has been instituted whether before or after the passing of this Act, it shall be discharged and made void, subject in the case of a proceeding instituted before the twentieth day of July, nineteen hundred and twenty, to such order as to costs as the court or a judge thereof may think fit to make:’

But the section has plainly a far wider operation than would be necessary in order to give to servants of the Crown the traditional form of relief against actions founded upon the exercise of illegal or excessive powers.<sup>1</sup> It provides not only for indemnity to the servants of the Crown against personal liability, but prohibits all legal proceedings, of whatever nature, against the Crown, in respect of anything done during the war and in terms provides<sup>2</sup> that for the purposes of the section a Petition of Right shall be deemed to be a ‘legal proceeding’.

<sup>1</sup> The immunity from legal proceedings conferred by section 1 is of course subject to the condition that the Act complained of was done in good faith and in the execution of duty or for the defence of the realm or the public safety or for the enforcement of discipline ‘or otherwise in the public interest’ by a person holding office under or employed in the service of the Crown. A certificate by a Government Department is sufficient evidence of authority (s. 1 (3)). Acts done under such authority are presumed to have been done in good faith, the onus of proving the contrary being upon the complainant (*ibid.*).

<sup>2</sup> Sect. 1, subsect. (2).



This prohibition is, no doubt, subject to certain modifications, of which the most material is the proviso to sect. 1, subsect. (1) that 'except in cases where a claim for payment of compensation can be brought under section two of this Act this section shall not prevent (*inter alia*):

(b) 'the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within one year from the termination of the war or the date when the cause of action arose, whichever may be the later.'

But whilst the procedure by Petition of Right is thus generally preserved as regards actions for breach of contract the effect of the exception contained in the proviso is to prevent any petition being brought for compensation for the requisition of private property. Such claims are referred to a special tribunal under the provisions of section 2, sub-section (1) of which is as follows :

'Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty—

- (a) being the owner of a ship or vessel which or any cargo space or passenger accommodation in which has been requisitioned at any time during the war in exercise or purported exercise of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation for the use of the

same and for services rendered during the employment of the same in Government service, and compensation for loss or damage thereby occasioned ; or

- (b) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage ;

and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final :

Provided that—

- (i) The provisions as to the statement of a case in any enactment relative to arbitrations shall not apply to any such tribunal, but if either party feels aggrieved by any direction or determination of the tribunal on any point of law, he may, within the time and in accordance with the conditions prescribed by rules of court, appeal to the Court of Appeal, or as respects Scotland to either division of the Court of Session, and the decision of the Court of Appeal or Court of Session on any such appeal shall, with the leave of that Court but not otherwise, be subject to appeal to the House of Lords ;
- (ii) nothing in this section shall confer on any person a right to payment or compensation unless notice of the claim has been given to the tribunal in such form and manner as

the tribunal may prescribe within one year from the termination of the war or the date when the transaction giving rise to the claim took place, whichever may be the later.'

This section it will be observed covers all cases of requisition, whether of ships, of land, or of chattels. Under subsection (2) of section 2, compensation is to be assessed in accordance with the following principles :

- (i) Where under any Regulation or order made or purporting to be made under any enactment relating to the defence of the realm, any special principle for assessment of any payment (including any price to be paid) or compensation or the rate thereof, is contained in the Regulation or order, such payment or compensation shall be assessed in accordance with that principle or rate :

Provided that nothing in this provision shall prevent the tribunal in assessing the payment or compensation from taking into consideration any circumstances which, under the regulation in question, it would have been entitled to take into consideration.

- (ii) Where the payment or compensation is claimed under paragraph (a) of subsection (1) of this section, it shall be assessed in accordance with the principles upon which the Board of Arbitration constituted under the proclamation issued on the third day of August nineteen hundred and fourteen has hitherto acted, which principles are set forth in Part I. of the Schedule to this Act.
- (iii) In any other case, compensation shall be assessed as follows :—

(a) If the claimant would, apart from this Act, have had a legal right to compensa-

tion the tribunal shall give effect to that right, but in assessing the compensation shall have regard to the amount of the compensation to which, apart from this Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation :

Provided that this subsection shall not give any right to payment or compensation for indirect loss.

(b) If the claimant would not have had any such legal right, the compensation shall be assessed in accordance with the principles upon which the Commission appointed by His Majesty under Commissions dated the thirty-first day of March, nineteen hundred and fifteen, and the eighteenth day of December, nineteen hundred and eighteen (commonly known as the Defence of the Realm Losses Commission), has hitherto acted in cases where no special provision is made as to the assessment of compensation, which principles are set forth in Part II. of the Schedule to this Act.'

Claims for compensation accordingly fall under three heads. Firstly, the special principles of assessment which have been laid down in the Defence of the Realm Regulations are to apply, with the result (for example) that for the existing market price of chattels there is to be substituted an assessment on the basis of cost, with the addition of an allowance for profit usually earned before the war. Secondly, claims by shipowners are to be assessed in accordance with the principles hitherto acted upon by the Admiralty Transport and Arbitration Board. Thirdly, a dis-

inction is drawn between cases in which, apart from the Act, a claimant would have had a legal right to compensation, and cases in which he would have had no such right.

The application of the rules laid down under the third head will, it may be anticipated, give rise to considerable difficulty. In the first place compensation on a somewhat more generous scale appears to be contemplated in cases in which a claimant can establish a legal right, apart from the Act, than in those in which his loss is not of such a nature as would give him a legal cause of action. An instance of a case in which a legal right to compensation exists is that of the occupation of land, as laid down in the judgments in the Case, the measure of compensation being that which is provided by the Defence Acts, and the Defence of the Realm Regulations lay down 'no special principle for assessment'. How the Courts will in such cases interpret the direction that regard is to be had to the war and to all other relevant circumstances, it is not easy to forecast. In the case of ships, however, and still more in the case of chattels the position is even more obscure. According to the decision in *Newcastle Breweries Ltd. v. The King*,<sup>1</sup> the right to compensation for goods requisitioned for the Navy or Army is a statutory right, the compensation being assessable on the basis of the fair market value. But for this measure there is now substituted the principle of assessment upon the basis of cost, together with an allowance for profit at the rate usually earned before the war, as provided by Defence of the Realm Regulation 2 B. Is an owner of chattels

<sup>1</sup> (1920) 1 K.B. 854.

so requisitioned entitled to the benefit of an assessment under subsection (2) (iii) (a) on the footing that he is in a position, apart from the Act, to establish a legal right? And, further, assuming a case of requisition in which the claim to compensation rests entirely on common law principles which have not been determined by adjudication in the Courts, is he to undertake the burden of establishing a legal right to compensation, in order to bring his claim within the operation of subsection (2) (iii) (a)?

If section 2 (iii) (a) had provided that the tribunal shall give effect to a legal right, if and when established, without qualification, the ordinary rules of law for the assessment of damage or compensation would apply. But the subsection affords no guidance as to how the tribunal is to 'have regard to' what are apparently intended to be modifications of the ordinary principles of legal assessment.

In the next place claims for 'indirect loss' are excluded. If this expression be intended as an affirmation of the rule that only direct and not remote damages are recoverable in law, it would appear to be superfluous. If, on the other hand, the effect be to introduce the somewhat restricted principles upon which compensation has been hitherto awarded by the Defence of the Realm Losses Commission, the distinction between cases falling within subsection (a) and those which fall within subsection (b) would to some extent disappear.

It is not within the scope of this excursus to suggest solutions of these difficulties, and indeed any attempt to do so would be premature, until some indication has been afforded by the decisions of the tribunal constituted by the Act, of the proper construction to be placed upon its provisions.

For the ancient form of procedure by Petition of Right the Act substitutes special tribunals under section 2 (4) :

‘ The tribunal for assessing payment or compensation shall, where by any of the Defence of the Realm Regulations any special tribunal is prescribed, be that tribunal, and in cases where the claim is made under paragraph (a) of subsection (1) of this section be the said Board of Arbitration, and in any other case be the said Defence of the Realm Losses Commission.’

The principal burden will no doubt fall in future upon the Defence of the Realm Losses Commission under its new title of the War Compensation Court, over which a Judge of the High Court of Justice, or, in cases where the claim is in respect of interference with property or business in Scotland a Judge of the Court of Session will preside.<sup>1</sup> The legal character of the tribunals charged with the duty of assessing compensation is further emphasized by the provisions for appeals on questions of law contained in proviso (i) to section 2, subsect. (1).<sup>‡</sup>

<sup>1</sup> s. 2, subsect. (5).

## APPENDIX A

### House of Lords.

Monday, May 10, 1920.

THE ATTORNEY-GENERAL (on behalf of His  
Majesty) . . . . . *Appellant*

AND

DE KEYSER'S ROYAL HOTEL, LIMITED . *Respondents.*

LORDS PRESENT :

LORD DUNEDIN.  
LORD ATKINSON.  
LORD MOULTON.  
LORD SUMNER.  
LORD PARMOOR.

### JUDGMENT <sup>1</sup>

LORD DUNEDIN : My Lords, it will be well that I should first set forth succinctly the facts which give rise to the present Petition, all the more that as regards them there is no real controversy between the parties. [*His Lordship then stated the facts as set out at pp. 1 to 3, ante.*] The relief asked was : ‘ (1) A declaration that your suppliants are entitled to payment of an annual rent so long as Your Majesty’s Principal Secretary of State for the War Department or Your Majesty’s Army Council or any other person or persons acting on Your Majesty’s behalf continues in use and occupation of the said premises. (2) The sum of £13,520 11s. 1d. for use and occupation of your suppliants’ said premises by your suppliants’ permission from the 8th day of May 1916 to the 14th day of February 1917. (4) A declaration that your suppliants are entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.’ To this reply was made by the Attorney-General on behalf of His Majesty to the following effect : ‘ (7) No rent or compensation is by law payable to the suppliants in respect of the matters aforesaid or any of them either under the Defence Act, 1842, or at all. The suppliants have been offered on behalf

<sup>1</sup> From the shorthand notes of Walsh & Sons, 4 New Court, Carey Street, W.C.



of His Majesty payment of such sum as in the opinion of the Defence of the Realm Losses Commission ought in reason and fairness to be paid to them out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown as aforesaid of its rights and duties in the Defence of the Realm.' The case depended before Mr. Justice Peterson, who dismissed the Petition,<sup>1</sup> holding himself bound by the decision of the Court of Appeal in *In re Petition of Right*.<sup>2</sup> Appeal being taken to the Court of Appeal, that Court, by a majority, Lord Justice Swinfen Eady (Master of the Rolls) and Lord Justice Warrington, Lord Justice Duke dissenting, reversed the decision of Mr. Justice Peterson and made the following declaration: 'And this Court doth declare that the suppliants are entitled to a fair rent for use and occupation of De Keyser's Royal Hotel on the Thames Embankment, in the City of London, by way of compensation under the Defence Act, 1842.'<sup>3</sup> Against this Order the present Appeal has been brought.

My Lords, I shall mention first, in order to put it aside, one argument put forward by the respondents. It was that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of an implied contract, the entry of the Crown to the premises having been permitted by the Receiver, and taken by the Crown in virtue of the Receiver's permission. The simple answer to this argument is that the facts as above recited do not permit of its application. In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as of right, basing that right specifically on the Defence of the Realm Act.<sup>4</sup> The Receiver did not offer physical resistance to the taking, and was content to facilitate the taking. He emphatically reserved his rights, and gave clear notice that he maintained that the Crown was wrong in its contention, and that no case for taking under the Defence of the Realm Act had arisen: in other words, that the Crown had under these circumstances, according to their proposals, unlawfully taken. To spell out of this attitude on either side an implied contract is, to my mind, a sheer impossibility. Now that the act of taking by the Crown

<sup>1</sup> 34 T.L.R. 329.

<sup>2</sup> 1915, 3 K.B. 649.

<sup>3</sup> (1919) 2 Ch. 197.

<sup>4</sup> Defence of the Realm Consolidation Act, 1914, 5 Geo. V, c. 8.

was in itself legal is necessarily admitted by both sides. It is the basis of the case for the Crown, who said at the time that they took under the Defence of the Realm Act, and now add in argument that whether that was so or not they took *de facto*, and can justify that taking under the powers of the Prerogative. It must necessarily be admitted by the respondents, for if taking in itself was purely illegal, then it would be a tort not committed by the Crown, who cannot commit a tort, but by the Officers of the Crown, and the Petition of Right would not lie. The question in the case is therefore narrowed to one point, and one point only; the Crown having legally taken, is it bound to pay compensation *ex lege*, or is the offer to pay compensation *ex gratia*, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands?

My Lords, I have already quoted the letter of May 1, which shows that the War Office propose to take possession of the hotel under the Defence of the Realm Regulations, but in the argument in the Court below, and before your Lordships, the taking has been justified by the power of the Prerogative alone, and there has been a very exhaustive citation of authority on the powers of the Crown in virtue of the Prerogative. I do not think it necessary to examine and comment on the various cases cited. The foundations of the contention are to be found in the concessions made in the speech of Mr. St. John in *Hampden's Case*,<sup>1</sup> and in the opinion of the consulted Judges in the *Saltpetre Case*.<sup>2</sup> I do not quote them, for they are fully quoted in the judgments of the Courts below and in the opinions of the learned Judges in *In re a Petition of Right*. The most that could be taken from them is that the King, as *suprema potestas*, endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the Realm in times of danger entitled to take any man's property, and that the texts give no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken. In view of this silence it is but natural to inquire what has been the practice in the past. An inquiry as to this was instituted in this case, and there has been placed before your Lordships a volume of extracts from the various records. The search is admittedly not exhaustive, but it is sufficient to be illustrative. The learned Master of the Rolls in his judgment<sup>3</sup> has analysed the documents produced. He has divided the

(1637) 3 How. St. Tr. 825.    <sup>2</sup> (1606) 12 Rep. 12.    <sup>3</sup> (1919) 2 Ch 221.

time occupied by the search into three periods, the first prior to 1708, then from 1708 to 1798, and the third subsequent to 1798. The first period contained instances of the acquiral of private property for the purposes of defence by private negotiation, in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorize the taking of lands and make provision for the assessment of compensation, the statutes being, however, of a local and not of a general character, dealing each with the particular lands proposed to be acquired. The third period begins with the introduction of general statutes not directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation.

I shall refer to the statutes presently, but, generally speaking, what can be gathered from the records as a matter of practice seems to resolve itself into this. There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. On the other hand, there is no mention of a claim made in respect of land taken under the Prerogative for the acquisition of which there was neither bargain nor statutory sanction. Nor is there any proof that any such acquisition had taken place. My Lords, I do not think that from this usage of payment there can be imposed on the Crown a customary obligation to pay, for once the taking itself is admitted to be as of right the usage of payment so far as not resting on statutory provision is equally consistent with a payment *ex lege* and a payment *ex gratia*. On the other hand, I think it is admissible to consider the statutes in the light of the admitted custom to pay, for in the face of a custom of payment it is not surprising that there should be consent on the part of the Crown that this branch of the Prerogative should be regulated by statute. It is just here that the full investigation into the statutory history which has been made in this case, and of which the Court of Appeal and your Lordships have had the advantage, serves to dislodge a view which I cannot help thinking was very influential in determining the judgment of the Court of Appeal in the case of *In re a Petition of Right*.<sup>1</sup> Digressing for the moment to that case, I am bound to say that I do not think that this case can be distinguished from that in essential particulars. The existence of a state of war is common to both. As to the necessity for the

<sup>1</sup> (1915) 3 K.B. 649.

taking over of the particular subject, the Crown Authorities must be the judge of that, and the evidence as to the necessity for the occupation of these premises in the opinion of the Crown advisers is just as distinct and uncontradicted in this case as it was in that. I confess that had I been sitting in the Court of Appeal I should have held the same view as was expressed by Mr. Justice Peterson, namely, that it was ruled by the case of *In re a Petition of Right*.<sup>1</sup> This, however, is immaterial, for *In re a Petition of Right*<sup>1</sup> is not binding on this House, and it would have been equally proper for the learned Master of the Rolls, Lord Justice Swinfen Eady, and for Lord Justice Warrington who had obviously changed his opinion on further argument, to give your Lordships the benefit of the opinions they had come to on the merits, even if, being unable to distinguish between the two cases, their judgment had been formally given to the opposite effect from what it was.

Now the view which I think prevailed in *In re a Petition of Right* was that the Prerogative gives a right to take for use of the moment in a time of emergency, that when you come to the Defence Acts of 1803 and 1842 you find a code for the taking of land permanently in times of peace as well as of war, and that consequently the two systems could well stand side by side; and then as there was no direct mention of the Prerogative in the statutes you were assisted by the general doctrine that the Crown is not bound by a statute unless specially mentioned. That in cases where the burden or tax is imposed the Crown must be specifically mentioned, no one doubts. Instances are given by the Master of the Rolls in the cases of *Wheaton v. Maple*,<sup>2</sup> and *Coomber v. Justices of Berks*,<sup>3</sup> and there are many others.

None the less, it is equally certain that if the whole ground of something which could be done by the Prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: 'What use would there be in imposing limitations if the Crown could, at its pleasure, disregard them and fall back on Prerogative?' The Prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.' Inasmuch as the Crown is a party to every Act of Parliament, it is logical enough to consider that when the Act deals with something which before the Act could

<sup>1</sup> (1915) 3 K.B. 649.<sup>2</sup> (1893) 3 Ch. 64.<sup>3</sup> (1883) 9 A.C. 61.

be effected by the Prerogative and specially empowers the Crown to do the same thing but subject to conditions, the Crown assents to that, and by that Act, to the Prerogative being curtailed.

I have read very carefully and considered the judgments delivered in *In re a Petition of Right*,<sup>1</sup> and it is, I think, apparent that the view of the series of statutes there presented was that the general statutes had their inception for the purpose of permanent acquisition in times of peace as well as of war, but in the fuller citation that has been made in this case we find that this is not so. It is somewhat significant that in the first statute of all dealing with the acquisition of land, 7 Anne, c. 26, we have a reference to 'the usual methods' that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury. It is also significant that in the whole statutory series there is no trace of any claim to take under the Prerogative and not to pay. On the contrary, for instance, in 31 Geo. II, c. 39, date 1757, we find during the war (that is the Seven Years War) land had actually been taken, that extravagant claims were feared, and then that is followed by a statutory provision for vesting the lands taken in trustees till the price may be paid as fixed by assessment by jury, and then on payment the trustees are to hold for His Majesty. But the real point seems to me to be that we find that even before the idea of a general Act, that is to say, when the Acts were limited in time to the continuance of a war, there is provision made for a temporary taking and for payment, or, in other words, for getting by statute, with the concomitant obligation of payment, that very temporary possession which, according to the view expressed above, was the function of the Prerogative to provide free of charge, leaving it to statute to provide for a permanent acquisition. Thus in 38 Geo. III, c. 27, date 1798, in the middle of the war with the revolutionary Government of France, which began in February 1793 and ended with the Peace of Amiens in March 1802, we find in section 10 powers given to His Majesty to authorize a general officer to mark out any piece of ground wanted for the public service, and to treat with the owner thereof or any person or persons having any interest therein 'for the possession or use thereof during such time as the exigencies of the service shall require', and in case of refusal, to take the land and get the value assessed by jury. This Act was limited to the continuance of the war. War again broke out against France on

<sup>1</sup> (1915) 3 K.B. 649.

April 29, 1803, Napoleon being first Consul for life, and 43 Geo. III, c. 35, July 1803, repeated the provisions of 38 Geo. III, c. 27. It again was limited to the duration of 'the present hostilities with France'. Then in 1804, there being still war with France and a prospect of invasion by Napoleon, 44 Geo. III, c. 95, was passed. This had no temporary clause. It recited that doubts had arisen as to whether the Act of 1803 authorized permanent acquisition, and it proceeded to provide for temporary taking, using the old phrase 'for such time as the exigencies of the public service may require', and contained the old arrangements for assessment of the payment by a jury. This Act was the forerunner of, and was superseded by, the existing Act of 1842,<sup>1</sup> which again repeats the words 'during the exigencies of the public service'. This Act was passed in time of peace. It thus appears that the inception of the legislation was during that very period and connected with that very requirement which, if the argument in *In re a Petition of Right* was sound, was satisfied by the powers of the Prerogative alone, that is to say, it dealt with temporary acquisition during a period of war, and the Act of 1842 only continued that legislation. It is therefore impossible, in my opinion, to say that the whole field of the Prerogative in the matter of the acquisition of land or rights therein was not covered by the Act of 1842. It follows from what I have said above that there is no room for asserting an unrestricted Prerogative right as existing alongside with the statutory powers authorizing the Crown to acquire on certain terms. The conclusion is that the Crown could not take the Petitioners' premises by the powers of the Prerogative alone.

I now come to the Defence of the Realm Consolidation Act of 1914,<sup>2</sup> the Act under the powers of which the Crown professes to take. Now, just as the statutes must be interpreted in view of what the rights and practices antecedent to them had been, so we must look at the Defence of the Realm Act in view of the law as it stood previous to its passing. The Defence of the Realm Consolidation Act, 1914, passed on November 27, 1914, declares by section 1, subsection (1), that His Majesty has power during the continuance of the war to issue regulations for securing the public safety and the defence of the realm. Subsection (2) says that any such regulations may provide for the suspension of any restrictions on the acquisition or user of land . . . under the Defence Acts, 1842 to 1875. Pursuant to

<sup>1</sup> 5 & 6 Vict. c. 94.<sup>2</sup> 5 Geo. V, c. 8.

this Act a regulation was issued on November 28, 1914, which empowered the competent Naval or Military Authority, or any person authorized by him, 'when for the purpose of securing the public safety or the defence of the realm it is necessary to do so (subsection (a)) to take possession of any land, and (subsection (b)) to take possession of any buildings.' It is clear that under these subsections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety, or the defence of the realm, that payment should not be made, such payment being on the hypothesis that the views above expressed as to the Act of 1842 were sound—a necessary concomitant to taking. The very structure of the Act points the same way. Why provide by subsection (2) for the suspension of restrictions under the existing Act which allowed of taking land if a mere taking *simpliciter* was all that was wanted? The thing may be tested in another way. Suppose the regulation as to taking land had had added to it the words 'without making any payment therefor'. That would have left no doubt as to the regulation. The question would have been, was it *ultra vires*? It could only be *intra vires* if it were necessary for the safety of the realm, and that is the same question over again, and again the existence of the powers of subsection (2) of the Act can be appealed to. The argument is practically analogous to the argument that prevailed, and I think rightly prevailed, in the judgment of Mr. Justice Salter in the case of *Newcastle Breweries Company v. The King*,<sup>1</sup> where the taking of the goods was held a necessity, but the extrusion of the subject where goods were taken from the King's Courts in the event of non-agreement as to value was not. It will have been noticed that the regulation which authorizes the taking of land says nothing about doing away with restrictions, or, in other words, does not specifically purport to be made in virtue of subsection (2) of the Act. None the less, it may well be held to be virtually so. There are various restrictions as to the initiation of proceedings, notices, &c., which I have not thought it necessary to quote. These may be taken as swept away by the simple authority to take. There remains the question whether the obligation to pay can be considered as a restriction and also swept away. I think it cannot. The word 'restriction' seems to me appropriate to the various provisions as to notice, but not at all appropriate to the obligation to make compensation.

<sup>1</sup> (1920) 1 K.B. 854.

There are two other matters as to which I should say a few words. The learned Attorney-General laid great stress on the words of section 1 of the Defence of the Realm (Acquisition of Land) Act, 1916,<sup>1</sup> which, providing for a continuation of powers after the war, begins thus : ' Where during the course of or within the week immediately preceding the commencement of the present war possession has been taken of any land by or on behalf of any Government Department for purposes connected with the present war, whether in exercise or purported exercise of any Prerogative right of His Majesty, or of any power conferred by or under any enactment relating to the defence of the realm or by agreement or otherwise, it shall be lawful,' &c. This, he argued, was a statutory confirmation and declaration of the power to take under the Prerogative. So it may be, but if the views expressed in the first part of my remarks are right it leaves those views untouched. And, further, the words used really amount to this. They do not in any way define the rights which the Crown has to take, but they say if the Crown has *de facto* taken *quo cunque modo* then it shall be lawful as thereafter provided to continue possession.

The other point is as to the remedy. I am of opinion that a Petition of Right lies, for, it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal.

On the whole matter I am therefore of opinion that the judgment of the Court of Appeal was right and ought to be affirmed, and the Appeal dismissed with costs.

LORD ATKINSON : My Lords, the facts have been already stated by my noble and learned friend who has preceded me.

If anything be clear in this important case it is, on the correspondence already referred to, this : that the Army Council, acting through their agent Captain R. C. Coles, did not claim to take possession of the respondents' hotel by virtue of the unrestricted and unqualified Prerogative of the Crown. On the contrary, they justified their action and claimed the right to do what they in fact did by virtue of the power and authority conferred upon them by the legislative provision of the Defence

<sup>1</sup> 6 & 7 Geo. V, c. 63.



of the Realm Regulations in force on May 1, 1916. It is, I think, equally clear that the respondents never admitted that the Crown possessed under these regulations the power it claimed to exercise. This is apparent from Mr. Whinney's letters of May 3 and 5, 1916. In only three ways, it would appear to me, could the respondents resist or oppose the action of the Crown: (1) by physical force—which is of course impossible; (2) by immediate proceedings at law; and (3) by protest. They adopted the last-named of these methods, but subject to that they yielded only to *force majeure*. Mr. Whinney no doubt informed Captain Coles that notwithstanding what he had said, all those interested in the hotel felt that every assistance should be given to the military authorities and that no steps should be taken which would cause inconvenience or delay, and further, that he had caused notice to be given to all the guests in the hotel and would hand over possession in accordance with the notice (i. e. the letter of May 1, 1916). Possession was handed over accordingly on May 8. It appears to me impossible on these facts to hold that this handing over by the respondents of the possession of their hotel was not in reality done *in invitum*. The respondents having done this and expressly reserved all their legal rights, they, like good citizens, without prejudice to those rights, facilitated those officers in taking over the possession in order to help the aerial service to be better carried on. If anything resembling what has taken place in this case had taken place between two citizens, it is obvious that the most appropriate remedy of the party aggrieved would have been to sue in trespass for damages. The respondents cannot proceed by Petition of Right to get redress for a tort-like trespass, for the King can do no wrong, and the principle of *respondent superior* does not apply to the Crown where the wrong is committed by its officers. It by no means follows, however, that because the respondents cannot sue in tort by Petition of Right, they can sue in contract for compensation for the use and occupation of their premises. It is no doubt quite true that a private person, or in some instances a public body, can, as it is phrased, waive a tort and sue in contract, but that can only be true where both of these remedies are open to him or it. The aggrieved party may then elect which remedy to pursue, and this though both causes of action arise out of the same transaction. The familiar case of a passenger in a railway train who takes and pays for a ticket to be carried to his destination and is injured *in transitu*

by the negligence of the company's servants is an instance of this. He can sue the company in either form of action. That, however, of course does not apply to a case where a trespasser enters into and holds possession of a man's land against his will while purporting to act under a power the existence of which the owner challenges and against the exercise of which he protests.

The Court of Appeal, as I understand their judgment, held that the Crown could be proceeded against by Petition of Right to recover compensation in use and occupation for the breach of its contract to pay for the use and enjoyment of the respondents' hotel, and several authorities had been cited to support this view. Differing as I do on this point from the views of the two learned Lords Justices who constituted the majority, and entertaining, as I do, the most sincere respect for the survivor of those two Lords Justices as well as for the memory of the distinguished Lord Justice since unhappily deceased, I feel bound to justify my dissent from their views by an examination of the authorities on the point at greater length, perhaps, than might otherwise be excusable. These authorities establish, I think, this proposition, that in order to recover in the ordinary action for use and occupation the plaintiff must prove the existence of an agreement, expressed or implied between him and the defendant, to the effect that the latter shall at least be the tenant at will of the former of the lands or premises occupied and shall pay for that occupation. In *Phillips v. Homfray*,<sup>1</sup> Lord Justice Bowen, as he then was, at page 461, said: 'Actions for use and occupation according to the better opinion have been confined to the class of cases where the defendant is not a trespasser setting up an adverse title; and where there are no circumstances that negative the implication of a contract (see *Churchward v. Ford*,<sup>2</sup> per Pollock C.B.). No doubt the mere enjoyment by one man of another man's property, real or personal, may be held under such circumstances as leave still open as a reasonable inference the presumption that it is on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station takes it on the implied promise to pay for it.' A familiar example of the class of cases in which the circumstances negative the implication of such a contract is where a purchaser enters with the owner's permission into possession of property sold under a contract of sale, the purchase of which subsequently

<sup>1</sup> (1883) 24 Ch. D. 439: affirmed on the ground that the appeal was out of time (1886) 11 A.C. 466.

<sup>2</sup> (1857) 2 H. & N. 446; 157 E.R. 184.

goes off. In *Howard v. Shaw*,<sup>1</sup> Baron Parke, at page 122, said : ' If the defendant had entered into possession under an agreement there is no doubt he would have been a tenant at will until the lease was granted. Here he may be assumed to have entered into possession under an agreement for sale which was to be carried into effect by a conveyance. . . . I quite agree, however, that while the agreement subsisted, the defendant was not bound to pay any compensation for the occupation of the land, because the contract shows that he was to occupy without compensation, but still he was tenant at will. When the agreement went off he was still tenant at will, but after that there was nothing to show that he was not to pay compensation because the stipulated compensation by payment of the purchase money was at an end. From that time, therefore, he became liable to be sued in an action for use and occupation.' Baron Alderson gave judgment to the like effect, as did also Chief Baron Palles in *Markey v. Coote*.<sup>2</sup>

Even on the assumption that the Crown went into possession of the hotel, not by virtue of a legislative title or by force of a paramount power, but by the permission of the respondents, for which the reasons already given I think it impossible to hold, I am at a loss to see how an agreement binding at law to pay for compensation for the occupation can be inferred in face of the distinct refusal of Captain Coles in his letter of May 1, 1916, to pay any compensation whatever *ex debito* but merely *ex gratia*. Chief Baron Pollock in delivering judgment said, ' There are authorities to the effect that where nothing appears except that one person is entitled to land which another has occupied and enjoyed an action for use and occupation may be maintained because a contract may be implied. That explains the decision in *Hellier v. Silcox*.<sup>3</sup> But the taking of possession as of right by a disseisor could not be turned into a contract on the notion that the trespass may be waived and some imaginary contract substituted. Here the defendant was in possession claiming title under Mrs. Foss with whom he had contracted. It cannot be implied that there was a contract with the plaintiffs.' It would certainly appear to me that in this case the position of the Crown in reference to this matter resembles more closely that of the disseisor whom Chief Baron Pollock mentions than it

<sup>1</sup> (1841) 8 M. & W. 118 ; 151 E.R. 973.

<sup>2</sup> (1876) I.R. 10 C.L. 149.

<sup>3</sup> (1850) 19 L.J. (Q.B) 295.

does that of a person entering with the permission of the owner of the premises.

I now turn to the authorities relied upon by the Court of Appeal. The first of these is the case of the *Marquis of Camden v. Batterbury*,<sup>1</sup> reported on appeal from the Common Pleas. There a certain builder named J. W. Elliott entered into an agreement with the landlord of certain lands, the plaintiff in the action, to build certain houses on these lands, the plaintiff agreeing as soon as one or more of these houses should be erected to make a lease to Elliott for a term of years upon certain terms of each messuage upon which a house was built. By the articles of agreement Elliott contracted that until the land with the buildings upon it should be leased to him, he would pay the same yearly rents or sums as were to be reserved by the lease when granted. Elliott assigned his interest in this agreement to the defendant, who took possession of the lands, erected certain buildings upon them, paid the stipulated yearly sums, and then assigned his interest to one White. The action was brought for money claimed to be payable by the defendant (White) to the plaintiff in respect of the defendant's use by the plaintiff's permission of certain of the latter's lands and premises. It was held, affirming the judgment of the Court of Common Pleas, that neither Elliott nor the defendant acquired any interest in the land under the building agreement, nor was any tenancy from year to year created thereby, nor by the occupation of the lands and the payment of the stipulated sums. With all respect, this case is, I think, an authority rather against the proposition it was cited to support than in favour of it. The next case is that of *Levi v. Lewis*,<sup>2</sup> affirmed on appeal to the Exchequer Chamber.<sup>3</sup> There Knight, the superior landlord, let the subject of the occupation to Levi the plaintiff for a term of years. Levi underlet to Lewis, the defendant, for the whole term, leaving no reversion to himself. The interest of both having expired together, Lewis applied to Knight to allow him to become his (Knight's) tenant. Knight refused and referred to Levi as still his tenant. Lewis continued to occupy, and Knight, to the knowledge of Lewis, continued to insist on holding Levi liable. Levi then sued Lewis for use and occupation of the land since the expiration of the term, and Levi then paid the rent for that period to Knight, who accepted it. The trial judge, Mr. Justice Willes, holding that

<sup>1</sup> (1860) 7 C.B. (N.S.) 864; 141 E.R. 1055.

<sup>2</sup> (1859) 6 C.B. (N.S.) 766; 141 E.R. 652.

<sup>3</sup> (1861) 9 C.B. (N.S.) 872; 142 E.R. 343.

there was no evidence to go to the jury of the use and occupation of the premises by Lewis as Levi's tenant, directed a non-suit. The Court of Common Pleas held that there was evidence to go to the jury on an implied contract by Lewis to pay Levi for the occupation of the premises. Mr. Justice Willes in delivering judgment said, 'Conceding that the relative position of the parties would not have enabled Levi to bring an action, yet their conduct was such that we think there was evidence from which a jury might infer an understanding or implied contract between Levi and Lewis that Lewis should pay for the occupation of the premises. . . . The jury might have thought that Lewis might have known he was not considered tenant to Knight, but that he was considered tenant to Levi, and that Knight and Levi had severally shown by their conduct that they severally took that view, adding, however, that the Court gave no opinion as to the conclusion to which the jury ought to come.' On appeal to the Exchequer Chamber Justices Wightman, Crompton, and Hill held that the decision of the Court of Common Pleas was right and should be affirmed. Barons Bramwell and Channel thought it was wrong and should be reversed, Baron Bramwell adding that Baron Martin when he left the Court was very much of his (Baron Bramwell's) opinion. If Lewis immediately on the termination of the term had told Levi that he stoutly refused to admit that he was under any legal liability to pay for compensation for his future occupation of the premises, there might possibly be some resemblance between this case and the present. As matters stand, there does not appear to me to be any resemblance whatever between them. The next case is that of *Hellier v. Silcox*.<sup>1</sup> In reference to this case, Lord Justice Bowen in *Phillips v. Homfray*,<sup>2</sup> at page 461, said, 'There have been, no doubt, instances in which, nothing further appearing in evidence, but that one person is the owner of the land and that another person has taken possession of it and enjoyed it, an action for use and occupation under the Statute has been upheld<sup>1</sup> (see *Hellier v. Silcox*). In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn that the enjoyment was by permission of the rightful owner.' Then follows the passage as to the more correct view already cited. The two facts (1) that the Crown in my view did not enter into possession with the free leave and consent of the respondents, but by the coercion of a superior power ;

<sup>1</sup> (1850) 19 L.J. (Q.B.) 295.<sup>2</sup> (1883) 24 Ch. D. 439.

and (2) that the Crown, when it did, through its officers, enter into possession absolutely refused to acknowledge any legal liability to pay compensation in respect of their use and enjoyment of the hotel, fundamentally distinguish all these cases from the present. In my opinion, therefore, a Petition of Right, not based upon the statutes of 1798, 1842, or 1914, nor the regulations made under them, but merely on such legal liability as arises between citizens when one occupies and enjoys the property of another with the express or implied permission of that other to pay compensation for that enjoyment, would on the facts of this case fail. It is an entirely different question whether on those same facts these statutes and regulations do not impose upon the Crown a statutory liability to pay reasonable compensation, in the form of a rent or otherwise, for the possession, occupation, use and enjoyment, acquired compulsorily, of the respondents' hotel.

The late Master of the Rolls in the following pregnant passage of his judgment<sup>1</sup> put a rather unanswerable question. He said: 'Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term "Prerogative"'. Where, however, Parliament has intervened and has provided by statute for powers previously within the Prerogative being exercised in a particular manner and subject to the limitations contained in the statute, they can only be so exercised; otherwise what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back upon Prerogative?' It was not contended, it could not, I think, be successfully contended, that the Act of 1842 and the Defence of the Realm Consolidation Act of 1914<sup>2</sup> (hereinafter referred to as the Act of 1914) do not bind the Crown, seeing that they deal with what is the special trust and duty of the King to provide for, namely, the defence and security of the Realm, and prescribe the mode in which and the methods by which land or its use is to be acquired by the Crown's officers, the Ordnance Department, the Admiralty, Army Council, the members of His Majesty's Forces, and other persons acting on his behalf for these very purposes, whether one applies the test suggested in Bacon's Abridgement (7th ed. vol. vii. 462), quoted apparently with approval by Sir John Jessel (Master of the Rolls) in *Ex parte Postmaster-General*<sup>3</sup> or that laid down by Lord Lindley in *Wheaton v. Maple*,<sup>4</sup> viz. that the Crown is never bound by

<sup>1</sup> (1919) 2 Ch. 216.

<sup>3</sup> (1879) 10 Ch. D. 595.

<sup>2</sup> 5 Geo. V, c. 8.

<sup>4</sup> (1893) 3 Ch. 64.

a statutory enactment unless the intention of the Legislature to bind the Crown is clear and unmistakable.

I think these statutes and regulations satisfy both tests. Before dealing with them, I desire to express my complete concurrence in the conclusion at which the late Master of the Rolls arrived as to the result of the searches made by the Crown touching the nature and particulars of the commissions issued in early times in order to determine what sums were paid *ex gratia* where lands were taken by the Crown or its officers for the defence of the realm and the occupation of them connected therewith by the military. The conclusion, as I understand it, is this, that it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative. I also concur with the conclusion at which that distinguished and learned judge arrived as to the purpose, object and effect of the body of legislation passed from the year 1708 to the year 1798, enabling land or the use of it to be compulsorily acquired by the Crown on the terms of the owner being paid for it. I further concur with him in his analysis of the provisions of the Acts passed in 1803, 1804, and 1819<sup>1</sup> dealing with the public service. I agree that in all this legislation there is not a trace of a suggestion that the Crown was left free to ignore the statutory provisions and by its unfettered Prerogative do the very things these statutes empowered the Crown to do, but free from the statutory conditions and restrictions imposed by the statutes. It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to the exercise by the Crown of, the powers conferred by a statute if the Crown were free at its pleasure to disregard all these provisions, and by virtue of its Prerogative do the very things the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature, in the absence of compelling words, an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its Prerogative, the Prerogative is merged in the

<sup>1</sup> The reference should be, not to an Act of Parliament, but to the extract from the Earl of Chatham's papers printed App. F, p. 295 *post*, from which it appears that legislation was contemplated—see per Swinfen Eady, M.R. (1919) 2 Ch. p. 223.

statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute expressing the will and intention of the King and of the three Estates of the Realm is passed, it abridges the Royal Prerogative while it is in force to this extent, that the Crown can only do the particular thing under and in accordance with the statutory provisions, and its Prerogative power to do it is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same, viz. that after the statute has been passed and while it is in force the thing it empowers the Crown to do can thenceforth only be done by and under the statute and subject to all the limitations, restrictions, and conditions thereby imposed, however unrestricted the Royal Prerogative may theretofore have been.

If that be so, as I think it is, then the first question to be determined is what particular things the Defence Act of 1842,<sup>1</sup> which is really the culmination of the legislation passed from 1800 downwards, enacts; what the Defence of the Realm Consolidation Act of 1914,<sup>2</sup> coupled with the regulations issued under it, empowers the Crown to do, and what are the conditions, if any, imposed upon the doing of them. By section 2 (1) of the Defence of the Realm Consolidation Act, 1914 (5 Geo. V, c. 8), passed on November 27, 1914, the two previous statutes 4 & 5 Geo. V, c. 29, and 4 & 5 Geo. V, c. 63, are repealed, but it is provided that nothing in that repeal shall affect any orders made thereunder and that all such Orders-in-Council shall until altered or revoked by an Order-in-Council under this Act (i.e. 5 Geo. V, c. 8) continue in force and be in effect as if made under this latter Act. By section 1, subsection (1), it is provided that during the continuance of the then present war His Majesty may issue regulations for securing the public safety and the defence of the realm, and as to the powers and duty for that purpose of the Admiralty and Army Council and the members of His Majesty's Forces and other persons acting on his behalf, and may by such regulations authorize the trial by court-martial or, in cases of minor offences, by courts of summary jurisdiction and punishment of persons committing offences against the regulations, and in particular against any of the provisions and regulations designed for the five particular purposes mentioned. The regulations must be designed to secure the public safety and defence of the realm. Section 2 provides that any such regulations, that is, any regulations issued to effect those two

<sup>1</sup> 5 & 6 Vict., c. 94.

<sup>2</sup> 5 Geo. V, c. 8.



objects, may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws or any other powers under the Defence Acts, 1842 to 1875,<sup>1</sup> or the Military Lands Acts, 1891 to 1903. There is no independent express provision in this Act of 1914 enabling the Crown, in the emergency of the war, to acquire land or the use of it for the purpose of securing the public safety and the defence of the realm. It must, therefore, I think, be assumed that by reason of the provisions of this second section it was designed and intended by the Legislature that the ample powers for the acquisition of land or the use of it either by agreement or purchase compulsorily conferred upon the Crown by the Act of 1842 should be availed of. Whether the land or its use were presumed to be acquired by voluntary purchase under its sixteenth section or compulsorily under its nineteenth section, the owner in each case was to be paid or compensated for what he parted with. In addition, by its twenty-third section a further restriction was placed upon the exercise of the power of compulsory purchase. That section enacted that no lands or buildings or other hereditament should be taken without the consent of the owner unless the necessity or expediency of taking it should be certified by the lord lieutenant of the county in which the land or hereditament lay, or, in the alternative, by one or more of the other public functionaries named, and unless the taking of the land or buildings or other hereditament should be authorized by a warrant signed by the Lord High Treasurer or one or more of the Commissioners of the Treasury of the United Kingdom for the time being.

The methods of modern warfare have so vastly changed since this Act of 1842<sup>2</sup> was passed, that if it was availed of as it stood by the Crown in the course of the late war, the restrictions might seriously delay and embarrass the Crown in taking through its officers adequate measures to secure the public safety and the defence of the realm, while if the restrictions were removed its amended machinery must be adequate for the occasion. It is apparently with this view that section 2 of the Act of 1914 is confined to the removal of those restrictions. There is no attempt to set up new machinery. The powers conferred by the Act of 1842, thus unfettered, are to be allowed to remain operative and available for use. The words of section 2, however, are 'restrictions on the acquisition or use of land'. When those

<sup>1</sup> See n. 1, p. 10, *ante*.

<sup>2</sup> 5 & 6 Vict., c. 94.

restrictions are examined it is, in my mind, clear that the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either, or a condition precedent to its acquisition. There is nothing in the statute to suggest that this liability to pay is to be affected or taken away by the regulations which may be issued, and if the regulations purported to do that I doubt if they would not, having regard to the wording of section 2, be *ultra vires*. Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognized rule for the construction of statutes is that unless the words of the statute clearly so demand, the statute is not to be construed so as to take away the property of a subject without compensation. Lord Justice Bowen, in *London and North-Western Railway Company v. Evans*,<sup>1</sup> at page 28, said: 'The Legislature cannot fairly be supposed to intend, in the absence of express words showing such intention, that one man's property shall be confiscated for the benefit of others or of the public without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can override or disregard this ordinary principle . . . if it sees fit to do so, but it is not likely that it will be found to disregard it without plain expression of such a purpose.' There is not in the Act of 1914<sup>2</sup> or in the regulations framed under it any indication of such a confiscatory purpose. The Regulations 2, 2A, do not expressly suspend any restrictions on the acquisition of or user of land imposed by the Defence Act of 1842.<sup>3</sup> They commence with the statement that the enjoyment of property will be interfered with as little as may be permitted by the emergency of the measures required to be taken for securing the public safety and the defence of the realm, and provide that the Admiralty, Army Council, and Air Council, and members of the Naval and Military Forces and the other persons executing the regulations shall, in carrying them into effect, observe these general principles. Thus, by section 2, it is further provided that the Naval and Military Authority (defined in Regulation 62) or any person duly authorized by him may, when necessary for the purpose expressly indicated, namely, for securing the public safety and defence of the realm, do several things involving the taking possession of land and user of the real property of

<sup>1</sup> (1893) 1 Ch. 16.<sup>2</sup> 5 Geo. V, c. 8.<sup>3</sup> 5 & 6 Vict., c. 94.

the subject without any of the preliminaries prescribed by the Defence Act of 1842 ;<sup>1</sup> for instance, he may take possession of any land, construct military roads thereon, remove any trees, hedges or fences therefrom ; take possession of any buildings or other property including works for the supply of gas, electricity, or water, or any sources of water supply ; take such steps as may be necessary for placing any buildings or structures in a state of defence ; cause any buildings to be destroyed, and finally do any other act involving interference with the private rights of property for the aforesaid purposes. As to real property, no preliminary procedure of any kind is prescribed, and no mention whatever is made as to payment or compensation in respect of it. As regards personal property, however, it is provided by the last clause of section 2 that if after the competent Naval Authority has issued notice that he has taken or intends to take possession of any movable property in pursuance of that regulation, any person having control of any such property sells, removes, or secretes it without the consent of the competent Military Authority he shall be guilty of an offence against the regulations. Presumably some such notice should be given in the case of real property, though that is not expressly provided. Then one finds a most significant provision in section 2B, namely, that where any goods the possession of which has been so taken are acquired by the Admiralty, Army Council or Air Council or the Minister of Munitions, those regulations on their very face justify an immediate taking possession of the real property of the subject without any preliminary formality or procedure. They are in absolute conflict with the provisions of the Defence Act of 1842,<sup>1</sup> imposing restrictions on the acquisition of land or its use and prescribing formalities. The two cannot be reconciled, and the irresistible conclusion must therefore be that the earlier provisions have been suspended by the later.

Again, it appears to me to be almost inconceivable that the Crown should claim the right to do such things as prostrate fences, take possession of the great industrial works mentioned, or cause any buildings to be destroyed without being bound at law to compensate the owners thereof therefor. The fact that no provision to a contrary effect has been introduced into these regulations touching real property, while one is introduced touching goods acquired, suggests, I think, that the provisions of the Defence Act, 1842,<sup>1</sup> touching payment or compensation for real

<sup>1</sup> 5 & 6 Vict., c. 94.

property taken or used were left to apply. There is nothing in these regulations inconsistent with their being so left. Much reliance was placed by the Crown on the Defence of the Realm (Acquisition of Land) Act, 1916<sup>1</sup>: First, because in its first section it recognizes that possession of land may be taken by a Government Department for the purposes connected with the war in exercise of a Prerogative Right of His Majesty, as well as under any statute relating to the defence of the realm or by agreement or otherwise. And it enables this Department to continue in possession of the land for any period not exceeding two years after the termination of the war. And, second, because by the same section it provides that the Department which continues to occupy the lands after the termination of the war shall pay a rent in respect of this continued occupation. As the regulations to be issued under the Defence of the Realm Consolidation Act, 1914, can only be issued and be operative during the war, of course they could not deal with possession of land after the war had ended, and therefore further possession had to be provided for, but it is difficult to see upon what just or rational principle the owner of land should be paid a rent for his land in respect of the possession of it while held by a Department after the war has terminated (obviously for the purposes of winding up the business of the Department), and not paid a rent or compensation for its use and possession by a Department of the State while the war continued. This last provision, it would appear to me, hinders rather than helps the contention of the Crown. I should be sorry to attempt to lay down any rule of general application by which the limits of the Royal Prerogative might be determined. That is not necessary, in my view, in this case. In my opinion in this case a statutory liability is imposed upon the Crown to pay for the use and occupation of the respondents' property. I base that opinion upon the facts of the case and the provisions of the legislation upon which the Officers of the Crown justified their action. The Attorney-General in his able argument relied much on the word 'temporary'—temporary use, temporary occupation. What does the word 'temporary' mean in such a connexion? It might cover years, yet mean only the duration of the war. In this case it covered over three years. At the beginning of the early stages of a war its duration never could be prophetically fixed even approximately. It has already been decided in your

<sup>1</sup> 6 & 7 Geo. V, c. 63.

Lordships' House in several instances that contracts whose performance is interrupted by war are terminated because the duration of the interruption cannot be even approximately foretold, so that the word 'temporary' would in the result mean in most cases of this kind the duration of the war, which might be years.

The only remaining point is whether a Petition of Right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *The Queen v. Doutré*,<sup>1</sup> and *Windsor and Annapolis Railway Company v. The Queen and the Western Counties Railway Company*,<sup>2</sup> such a Petition will lie. I can see no valid distinction between a sum due under a contract or grant made on behalf of the Crown mentioned by Chief Justice Erle in *Tobin v. The Queen*,<sup>3</sup> and compensation due for the lawful and authorized use and enjoyment by the Officer of the Sovereign on the Sovereign's behalf of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no wrong. I therefore think that the Appeal fails, that the judgment of the Court of Appeal was right and should be affirmed, and this Appeal be dismissed with costs.

LORD MOULTON: My Lords, the present Appeal is in the matter of a Petition of Right presented by De Keyser's Royal Hotel, Limited, the owners of the well-known hotel of that name, for compensation for the compulsory occupation of certain parts of their premises by the War Office acting in the name and on behalf of the Crown for purposes connected with the Defence of the Realm during the late war. The Crown contests the right of the suppliants to compensation for such compulsory occupation, and pleads that it was an exercise of the Royal Prerogative and gave no right of compensation to the subject. The facts of the case are not substantially in dispute, the real issue being a question of law of great and general importance. I shall therefore deal very shortly with the evidence as to what actually took place at the time when occupation of the premises was taken by the Crown.

In April 1916 the authorities at the War Office came to the conclusion that the premises in question were the most suitable for housing the heads of the Department having charge of the Army Air Service, and accordingly they, by a letter dated

<sup>1</sup> (1884) 9 A.C. 745

<sup>2</sup> (1886) 11 A.C. 607.

<sup>3</sup> (1863) 16 C.B. (N.S.) 310.

April 18, 1916, instructed the Office of Works to make immediate arrangements to acquire them for that purpose. Negotiations were thereupon commenced between the Office of Works and Mr. Whinney (who then represented the suppliants' interest) for such acquisition. It was at first proposed that they should be acquired voluntarily at an agreed rent, but as the parties differed as to the amount of this rent the Board of Works abandoned the negotiations and informed Mr. Whinney that they were about to 'communicate with the War Office with a view to the total premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner'. The War Office agreed to this course being taken, and on May 1 the Office of Works, by their direction, wrote to Mr. Whinney a letter, the material parts of which are as follows: 'De Keyser's Royal Hotel, E.C. Dear Sir, I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations (excluding the shops, the other portions unlet, and the wine cellars). . . . We do not propose to take possession until the 8th instant, but I shall be glad if you will accept this as formal notice of the Department's intention to take possession on that day.' In accordance with this notice a representative of the War Office attended on the 8th instant and took possession of the premises, which were forthwith occupied by the Military Authorities and continued to be so occupied throughout the period of the war. It is in respect of this occupation that the suppliants claim compensation.

The representatives of the Crown have throughout insisted that possession was taken of the premises under the Royal Prerogative, and that therefore the suppliants were not entitled as of right to any payment by way of compensation, but that their sole remedy was to apply to a certain Commission named the Defence of the Realm Losses Commission, for an *ex gratia* allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. This Commission was appointed by Royal Order on March 31, 1915, 'to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid to applicants . . . in respect of direct and substantial loss and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the Defence of the Realm'. It is evident that the existence of the powers of this Commission can have

no bearing upon the question raised by this Petition of Right. Its jurisdiction is restricted to 'cases not otherwise provided for', and the whole basis of this Petition of Right is that the case is already provided for. The suppliants claim that they have a legal right to the compensation, and it is that right which they are seeking to enforce by this petition. In the petition the suppliants put forward an alternative ground for their claim, viz. that the premises were given up to the Government by them voluntarily under circumstances which would in law imply a contract on the part of the Crown to pay for use and occupation of the premises. Without discussing the conditions under which such a contract may be implied, it suffices to say that in my opinion it is abundantly clear that the premises were not surrendered voluntarily but were taken compulsorily. Both parties in their letters written at the time treat it as a case of commandeering, as it in fact was, and Mr. Whinney protested strongly against the action of the Government in the matter. In short, he did everything to prevent their taking the premises, short of refusing to give them up unless the Government used physical force to obtain an entry. Had he gone further in his resistance than he actually did he would clearly have put himself in the wrong, for whatever be the suppliants' right as to compensation, the Government were undoubtedly entitled to commandeer the premises if they needed them for the purposes of the Defence of the Realm.

In deciding the issues raised herein between the Crown and the suppliants, the first question to be settled might in the present case be, to my mind, treated as a question of fact, viz. Was possession in fact taken under the Royal Prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, this is a matter which does not admit of doubt. Possession was expressly taken under statutory powers. The letter of May 1, 1916, from the representative of the Army Council to Mr. Whinney says: 'I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations.' It was in response to this demand that possession was given. It is not competent to the Crown who took and retained such possession, to deny that their representative was acting under the powers given to it by these regulations, the validity of which rests entirely on statute. It was not a matter of slight importance whether the demand for possession purported to be made under the statutory powers of the Crown or the Royal Prerogative. Even

the most fervent believer in the scope of the Royal Prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act and the regulations made thereunder. It was for that purpose that the Act was passed and the regulations made. But even if that were not so, there was a manifest advantage in proceeding under the statutory powers. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute. The statutory powers of the Crown were formulated in the regulations in a manner which was beyond mistake. For example, the regulations gave to the Crown the power 'to take possession of any buildings'. Mr. Whinney, therefore, was clearly bound to surrender the premises when demanded. It would have been a very different matter had the demand been made under the Royal Prerogative. This litigation itself is enough to show how debatable a proposition it would have been if the claim had been made that the ancient Prerogative of the Crown covered the taking of an hotel in London for the more comfortable housing of a military staff and its clerks and typewriters. All such questions were put at rest by the Legislature giving express statutory authority by the regulations. There could henceforward be no doubt that the Crown possessed the powers formulated in the regulations and this was the object of the legislation. But when the Crown elects to act under the authority of a statute, it, like any other person, must take the powers that it thus uses *cum onere*. It cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers.

The Defence of the Realm Consolidation Act, 1914,<sup>1</sup> commenced by enacting that 'His Majesty in Council has power to issue regulations for securing the public safety and the defence of the Realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the Members of His Majesty's Forces and other persons acting on his behalf'. It then goes on to particularize certain subjects to which these regulations may relate, and in subsection (2) it deals with the question of the acquisition of land as follows: '(2) Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws, or any other power under the Defence Acts, 1842-75, or the Military Lands Acts, 1891-3.' The Defence

<sup>1</sup> 5 Geo. V, c. 8.



Act, 1842<sup>1</sup> (which may be taken to represent the whole of the Defence Acts, inasmuch as the latter Acts only modify it in details which do not concern the matter in this case) is the last of a series of Acts regulating the acquisition of lands and interests in land for purposes of the Defence of the Realm. These Acts commence in 1708 and occur at intervals up to 1842. At first they related only to land for fortifications at places mentioned in the Act, but later they became more general in their character, and authorized the Crown to select suitable land and acquire it. In all cases compensation was given to the owners for the land taken. But it is not necessary to dwell on their provisions, seeing that the Defence Act, 1842,<sup>1</sup> repealed all such existing Acts, and laid down general provisions which have regulated since that time the procedure for the acquisition by the Crown of land for such purposes. This Act gives very wide powers to the Crown. It has unrestricted powers of selection of the necessary lands, buildings, &c., to be taken. It contemplates, in the first instance, voluntary purchase; but, if that cannot be arranged, then the lands, &c., may be acquired compulsorily, subject to certain certificates being obtained as to the necessity or expediency of the acquisition, or in case of actual invasion. I am satisfied that it enables the Crown to acquire either the property or the possession or use of it as it may need. In all cases compensation is to be paid by the Crown, the amount to be settled by a jury. The regulations and the Act under which they are made must, of course, be read together, and it is, in my opinion, a sound inference from the language of subsection (2), that the Legislature intended that, so far as the acquisition or user of land was concerned, the regulations should take the form of action under the Defence Act, 1842,<sup>1</sup> facilitated by the suspension of some or all of the restrictions which it imposes. The particular provisions relating to the taking of land or buildings are to be found in section 2 of the regulations. They empower the Military Authorities to take possession of any land or of any buildings where, for the purposes of the defence of the Realm, it is necessary so to do. These are very wide powers, but so general are the powers of the Defence Act, 1842,<sup>1</sup> that they would be attained by simply suspending the restrictions therein contained, and allowing its powers to be put in force without them. Reading, therefore, this regulation with subsection (2) of the Act, I think it is clear that in the case of acquisition and

<sup>1</sup> 5 & 6 Vict., c. 94.

user of land under the regulations, we ought to consider them as authorizing action being taken under the Defence Act, 1842, save that no restrictions therein appearing are to be enforced. The duty of paying compensation cannot be regarded as a restriction. It is a consequence of the taking but in no way restricts it, and therefore, as the acquisition is made under the Defence Act, 1842, the suppliants are entitled to the compensation provided by that Act.

On these grounds, therefore, I am of opinion that the suppliants are entitled to our judgment in this Appeal. But it would be unsatisfactory in a case of such general importance to leave unconsidered the question whether, apart from the fact that the Crown, expressly purported to be acting under powers given to it by statute, the suppliants' claim could be maintained. To decide this question, one must consider the nature and extent of the so-called Royal Prerogative in the matter of taking or occupying land for the better defence of the Realm. I have no doubt that in early days, when war was carried on in a simpler fashion and on a smaller scale than is the case in modern times, the Crown, to whom the defence of the Realm was entrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the Realm when the necessity arose. But such necessity would be, in general, an actual and immediate necessity arising in the face of the enemy and in circumstances where the rule *Salus populi suprema lex* was clearly applicable. The necessity would in almost all cases be local, and no one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were necessary so to do. Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have any claim against the Crown for compensation in respect of the damage they had thus suffered. It must not be forgotten that in those days the costs of war were mainly borne by the Royal Revenues, so that the King himself was the heaviest sufferer. The limited and necessary interference with the property of the subjects of which I have spoken, would have been looked upon as part of the damage done by the war which it had fallen to their lot to bear, and there is no reason to think that any one would have thought that he had a claim against the Crown in respect of it. Certainly no trace of any such claim having been put forward is to be found.

This state of things lasted for several centuries. The record

of the preparations made by Queen Elizabeth to resist the attack of the Spanish Armada, which are contained in the papers in this case,<sup>1</sup> show that it was in full force in her time. I am not surprised that the careful (though necessarily incomplete) researches into the Public Records have found no precedent for the claim as of right against the Crown for acts done under its Prerogative in occupying or using land under the stress of such a necessity as I have spoken of, and I do not think that a complete investigation would have met with greater success. But in the last three centuries very important changes have occurred which have completely altered the position of the Crown in such matters. In the first place, war has become far more complicated and necessitates costly and elaborate preparations in the form of permanent fortifications and otherwise, which must be made in times of peace. In the second place, the cost of war has become too great to be borne by the Royal Revenues so that the money for it has to come from the people through the Legislature, which long ago assumed and has since retained the command of all national resources. In the third place, the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation, and should not be allowed to fall on particular individuals, has grown to be a national sentiment. The effect of these changes is seen in the long series of statutes relating to the occupation of land for the purposes of fortifications or otherwise for national defence, to which I have already referred and which cover the last two centuries. In all these Acts provision was made for compensation to the individual whose lands were taken or used, and, indeed, there is clear evidence that for many years prior to the first of these statutes the Crown acted on this principle. It is not necessary to examine these Acts in detail. They were mostly local in their operation, and frequently temporary and usually related to specific fortifications which it was proposed to erect. But towards the beginning of the last century the Acts take on a more general and permanent form, and eventually they culminate in the Defence Act, 1842,<sup>2</sup> which gives to the Crown through its properly appointed officials the widest possible powers of taking land and buildings needed for the defence of the Realm under a minutely defined procedure set out in the Act. It contemplates that the acquisition shall, as a rule, be by agreement, but it gives ample powers of compulsory acquisition

<sup>1</sup> App. D, p. 247, *post*.

<sup>2</sup> 5 & 6 Vict., c. 94.

if the necessity be duly vouched, or in case of an actual invasion. In all cases compensation for the taking or using of the land by the Crown is to be assessed by a jury who (in the words of the Act) have to find 'the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments or for the possession or use thereof as the case may be'. This Act was not limited either in time or place, and with small modifications which are not material for our present purpose, is still in force.

What effect has this course of legislation upon the Royal Prerogative? I do not think that it can be said to have abrogated that Prerogative in any way, but it has given to the Crown statutory powers which render the exercise of that Prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the Prerogative itself. But it has done more than this. It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual but shall be borne by the community. This being so, when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute, and, therefore, subject to the equitable provision for compensation which is to be found in it. There can be no excuse for reverting to Prerogative powers *simpliciter*, if, indeed, they ever did exist in such a form as would cover the proposed acquisition, a matter which is far from clear in such a case as the present, when the Legislature has given to the Crown statutory powers which are wider even than any one pretends that it possessed under the Prerogative, and which cover all that can be necessary for the defence of the nation, and which are, moreover, accompanied by safeguards to the individual which are in agreement with the demands of justice. Accordingly, if the commandeering of the buildings in this case had not been expressly done under statutory powers, I should have held that the Crown must be presumed to have acted under these statutory powers and thus given to the subject the statutory right to compensation.

In the argument for the Crown reference was made to the Defence of the Realm (Acquisition of Land) Act, 1916.<sup>1</sup> This Act was passed subsequently to the taking of the suppliants' lands, and, therefore, has no bearing on the question before this

<sup>1</sup> 6 & 7 Geo. V, c. 63.

House. There is nothing in it which purports to take away any right already acquired by the suppliants, and if it modifies in any way the quantum of the compensation, that is a matter for the tribunal which will have to assess it and is not relevant to the present Appeal. I am, therefore, of opinion that the suppliants are entitled to the declaration in the form approved of by the Court below, and that this Appeal should be dismissed with costs.

LORD SUMNER: My Lords, the petition alleges in substance two rights to compensation, one for a rent for the use and occupation of this hotel, of which the Crown took possession with Mr. Whinney's permission, the other for a fair rent as compensation because he voluntarily delivered possession, though protesting against the rights then alleged and maintaining his own claims of right, whatever they might be. The answer and plea, beside traverses, allege an exercise of the Royal Prerogative for the defence of the Realm, and also rely on the Defence of the Realm Consolidation Act, 1914,<sup>1</sup> and the Regulations issued thereunder. Mention is made of an offer to pay whatever the Defence of the Realm Losses Commission might award, but I think this topic has no relevance. The payment would have been none the less an *ex gratia* payment, though the sum to be paid had been calculated under the forms of a judicial proceeding. Its acceptance would have involved a waiver of the suppliants' alleged right; its refusal cannot be an answer to that right, if they can establish it.

Another introductory argument may be mentioned to be put aside. The appellant, as I understand it, contends that what was done was done under the Prerogative, and not otherwise. If the Prerogative was exceeded then every servant of the Crown who used the premises would be personally guilty of trespass, and trespass being the suppliants' real remedy, the Crown succeeds. It is the typists and the clerks who are liable. If, on the other hand, the Prerogative was not exceeded, the Crown succeeds again. The singularity of this result certainly invited criticism, and I was at first inclined to think that there might be an answer analogous to the rule of waiving a tort and suing on an implied assumpsit. When a civil right may be vindicated in more ways than one, there is a choice of remedies (*Rodgers v. Maw*);<sup>2</sup> nor does it necessarily follow that this choice only arises between such remedies as are available against one and the same party.

<sup>1</sup> 5 Geo. V, c. 8.

<sup>2</sup> (1846) 15 M. & W. 444; 153 E.R. 924.

If the servant of a company, acting *ultra vires* the company, converts a stranger's chattel and, having sold it, pays the proceeds into the company's account as its servant, I suppose conversion would lie against the servant and for money had and received against the company (cf. *Smith v. Hodson*).<sup>1</sup> I have, however, come to the conclusion that no real advantage will be gained by pursuing arguments turning on forms of actions, for this reason. The suppliants must make out their right, and when they allege a right under the Defence Acts they negative any wrong done in the name of the Crown. There was no trespass by the clerks and the typists. They acted on a possession lawfully taken by the Crown, but a possession taken upon terms, and those terms were such as gave the suppliants a right to compensation. The only question is whether there is a statutory right against the Crown under the Defence Acts. In terms the Crown purported to requisition under the Defence of the Realm Acts, and, on the correspondence, I think that there was no such request by the Crown for leave to occupy, followed by consent on the part of the respondents as would support a claim to a *quantum meruit* compensation of rent apart from the statutes. There was nevertheless such assent as prevents the occupation from having been taken wholly *in invitum*, so as to leave the respondents no position but that of the sufferers of a wrong. Obviously Mr. Whinney's duty and interest alike impelled him to insistence on compensation, not to resistance to taking possession. It was money, not the hotel, that he wanted, and it does not matter whether he knew or not on what legal ground to put his claim. The question does not legally turn on permission or submission. On the facts he cannot say that he so gave possession as to imply a contract for rent, but I see nothing in them to exclude his assertion of a right to compensation, if he can establish that right in law.

The Crown has throughout purported to act on statutory rights (whether fully or correctly referred to or not), and the Prerogative has not been vouched except in argument in the present case. I do not mean that it is not open to the Law Officers to rely on the Prerogative now, or that I assume the writer of the letter dated April 29, 1916 to have had any authority to bind the Crown by an election between its statutory and its Prerogative rights. If, however, under the statutes, including the Defence of the Realm Acts, which deal with taking buildings

<sup>1</sup> (1791) 4 T.R. 211 ; 100 E.R. 979.

for the public safety and the defence of the Realm, the Crown had the power to requisition this building on terms as to compensating the respondents, I think it cannot contend now that by the course taken the exercise of statutory powers was excluded, and that none were in fact exercised. To begin with 1914, the question then arises, whether the premises could have been acquired simply under the Defence of the Realm Consolidation Act, 1914,<sup>1</sup> and the Regulations made thereunder, to the exclusion of the Defence Acts, and so to the exclusion of any right to compensation, or whether if statutory powers were exercised at all, they must have included the powers (and the obligations) for which these Acts provided. I think that no real importance attaches to the re-arrangement of section 1, which was made when the Statute of November 27, 1914 superseded that of August 8. The Defence of the Realm Consolidation Act, 1914,<sup>1</sup> does not purport to embody in the form of an enactment the Crown's existing Prerogative. The Act empowers the Crown to issue regulations. Now there is no Prerogative to make regulations, though it may be that some of the things which may be regulated under the Act might also be done under the Prerogative. It is, however, also clear that some things which may be validly ordered under regulations under the Act could not have been done under the pre-existing Prerogative. Further, under this Act alone no building could be requisitioned unless and until some regulation had been issued to that effect. Two kinds of regulations might be issued, one for the purpose of securing the public safety and the defence of the Realm, and the other in order to alter the existing Acts of Parliament for the time being by providing for the suspension of any restrictions on the acquisition or user of land contained in sundry named Acts. Section 1, subsection 1, provides for the first kind; section 1, subsection 2, for the second. Of the Regulations, No. 2 is that material to the present purpose; it deals with taking possession of any buildings and with doing any act (other than those specially described) involving interference with private rights of property. If the Crown were to exercise the powers of taking buildings, which are given by the Defence Acts, this regulation could well be held to dispense with the formalities prescribed by them. They would be restrictions, which the regulation would have suspended. The obligation to pay compensation to the dispossessed owner, which that Act provides for, is, however, not

<sup>1</sup> 5 Geo. V, c. 8.

a restriction on the acquisition of his land. It might discourage the exercise of the power of acquisition but it does not limit that power. The power is complete independently of payment, and it is fully exercised before the obligation to pay arises.

The next question is, should Regulation 2 be regarded as having been made in exercise of the powers given by the first or by the second subsection of section 1 of the Defence of the Realm Consolidation Act <sup>1</sup>? In other words, is it to be regarded as an exercise of a power to requisition under regulations issued for the purpose, or as an exercise of the power to facilitate requisitioning already authorized? It is true that it authorizes the competent naval or military authority to do the above-mentioned things 'for the purpose of securing the public safety, or the Defence of the Realm', but that is the purpose mentioned in section 16 of the Defence Act, 1842,<sup>2</sup> and the words may only be a reference to that section. Furthermore, the regulation deals with many matters beside the acquisition of land and buildings, and these would in any case require a substantive reference to the above purposes, which sufficiently accounts for the use of the words without its being necessary to read them as pointing to the exercise of a new power of requisitioning. With all respect to the opinion expressed by Mr. Justice Avory,<sup>3</sup> I think it should be treated as only an exercise of the power of suspending restrictions given by subsection 2. If it were held that this regulation is to be deemed to have been made, so far as the acquisition of land or buildings is concerned, in exercise of new powers given by subsection 1, on the ground that the regulations to be issued are regulations as to the powers of the Army Council from time to time and not merely as to the exercise of its powers, then it would follow that the Crown, having full power of accomplishing the desired acquisition under the Act of 1842,<sup>2</sup> and of suspending any inconvenient restrictions on that power, must be deemed to have been advised to exercise a new power of accomplishing the same object, differing from the existing power in one respect only, namely, that it is accompanied by no obligation to pay the subject anything. I think it should not be assumed that, even if the Crown has such a power under section 1, it has been advised to exercise it solely to avoid paying a subject for the exclusive use of his property. The presumptions must be, both that the executive action was taken under powers by which it can be justified, rather than beyond all powers whatever, and that the

<sup>1</sup> 5 Geo. V, c. 8.<sup>2</sup> 5 & 6 Vict., c. 94.<sup>3</sup> (1915) 3 K.B., p. 653.



available powers have been exercised so as to prevent and not so as to cause avoidable injury to the subject. Further, the Defence of the Realm Consolidation Act<sup>1</sup> by subsection 2 of section 1 gives an express and limited power of altering by regulation what is enacted by the Defence Acts. I think that no further power of restricting those enactments is intended to be conferred by the general words of subsection 1, nor ought that subsection, couched as it is in general terms only, to be construed as authorizing the Crown to do by regulation what the Legislature itself has already fully provided for by statute, least of all when that regulation would have the effect of taking the subject's property without compensation contrary to the intention of the prior Acts.

The next question must be, is the Defence Act, 1842,<sup>2</sup> with the other Defence Acts, adequate to enable the Crown to effect such an object for the purpose of the Defence of the Realm as that involved in the taking of this hotel? It is true that the Act enables much more to be done and that the provisions for a greater or a less exercise of the power of taking lands are not kept separate. The same series of sections enables the Crown to take lands under the Act in peace or in war, in absolute ownership and in perpetuity, or for temporary occupation only, but there is no difficulty in severing these provisions. It is true that, except for an express saving in section XXXIV, the Royal Prerogatives are not named, but the powers of taking land are such as only the Crown by its proper officers and departments can exercise, and the restrictions on the exercise of the statutory powers, which the Act requires, must necessarily be restrictions upon the powers of the Crown. It is true that some of these restrictions might in time of war be inconvenient in moments of extreme peril; of these the most formidable is the giving of a fourteen days' notice, though I observe that some overtures for this hotel were made in November 1915, and when the officials came to business in 1916, eleven days were passed in negotiating for a rent, and the parties got as close together as £19,000 and £17,500 before it was thought necessary to refer to the Defence of the Realm Act. If, however, formalities not inconsistent with the exigencies of a state of war in 1842 would have been prejudicial to the public service in 1916, the powers given by subsection 2 of section 1 of the Act of 1914<sup>1</sup> had only to be exercised, as in fact they were, and all these difficulties

<sup>1</sup> 5 Geo. V, c. 8.

<sup>2</sup> 5 & 6 Vict., c. 94.

would vanish. I see no reason to doubt that the Act of 1842<sup>1</sup> gave all the powers necessary for the exigencies of the recent war, subject only to the removal of restrictions contained in it, and there is, therefore, nothing to rebut the natural presumption that Regulation 2 is, in so far as it deals with the matters to which the Defence Acts would apply, only an exercise of the power of removing existing statutory restrictions, and is not new legislation by which the Crown takes new and unrestricted powers in order to obtain the same result.

The appellant further contended that all that was done could be done and was done independently of any statute by virtue of the Royal Prerogative alone. I do not think that the precise extent of the Prerogative need now be dealt with. The Legislature by appropriate enactment can deal with such a subject-matter as that now in question in such a way as to abate such portions of the Prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a *modus operandi* for securing the desired result which is not the same as that of the Prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the Prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of attaining the same object. Even the restrictions (such as they were) imposed by the Defence Acts on any powers of requisitioning buildings in time of war were in no way inconsistent with an intention to abate the Prerogative in this respect, if not absolutely (*New Windsor Corporation v. Taylor*<sup>2</sup>), at least for so long as the statute operates. In truth, the introduction of regulations so reasonable only strengthens the substance of the Royal authority by removing all semblance of arbitrary power. When, however, the matter is looked at, as it now must be, in the light of Regulation 2, no room for doubt remains. The Regulation has the force of statute, and under its amelioration of the Defence Acts everything could be done for this purpose that could be done under the Prerogative, equally efficiently and with equal speed. One difference, and one only, can be found. According to the argument, under the Prerogative the subject could claim no compensation for losing the use of

<sup>1</sup> 5 & 6 Vict., c. 94.

<sup>2</sup> (1899) A.C. 49.

his property ; under the statute he could. Is it to be supposed that the Legislature intended merely to give the Executive, as advisers of the Crown, the power of discriminating between subject and subject, enriching one by electing to proceed under the statute, and impoverishing another when it requisitions under the alleged Prerogative ? To presume such an intention seems to me contrary to the whole trend of our constitutional history for over 200 years. Nor is it a reasonable interpretation to say that the object of the Defence Acts was merely to supplement the Prerogative by enabling the Crown to pay compensation out of public funds to a subject damnified by the exercise of the Prerogative, which otherwise it would not be able to do. A Prerogative Right to take without paying must have been a right to take without paying out of the Royal funds, but, in truth, Prerogative can at most extend to taking, and stands quite apart from payment. There is no Prerogative Right to elect not to pay. Conversely, if there is adequate power to do all that is required by proceeding under the Statute, where is the emergency and public necessity, which is the foundation for resort to the Prerogative ? My Lords, for these reasons I think that the Executive did not take possession under the Prerogative, for the Defence Acts had superseded it ; that the Act of 1914 and Regulation 2 did not in themselves enable possession to be taken ; that the taking of possession must be referred to the powers given by the Defence Acts ; and that, in consequence, the suppliants are entitled to be compensated in accordance therewith. I do not refer to the many statutes which preceded the Defence Act, 1842, from the time of Queen Anne, because they only seem to me to justify without altering my reasons for this conclusion.

This being so, there are only two further matters to which I wish to refer. They are the search which was made into the Public Records at the suggestion of the late Master of the Rolls, and the passages which have been cited from the opinion of the Judicial Committee in the case of *The Zamora*.<sup>1</sup>

That the search for documents relating to the taking of land for fortifications and similar purposes in times past was left incomplete and, indeed, was not much more than begun, is matter of considerable regret. So far as it went, it is said to have been inconclusive. Probably it will never go any further, for the result has scarcely been such as would encourage the Executive

<sup>1</sup> (1916) 2 A.C. 77.

to proceed with it, and the subject does not greatly attract the student of history. The records cover both peace and war. The result, as it stands at present, seems to be this. Many documents are forthcoming which relate to the taking of land for such purposes by agreement and on payment of compensation. None can be found relating to taking land as of right and without any compensation at all, even in time of war. No Petition of Right is to be found in which a suppliant seeks to recover compensation, but whether this be, as the Crown suggests, because no subject ever had the temerity to put forward such a contention, or, as the respondents argue, because the Crown never gave him occasion to do so, is a matter which remains unknown. There appears to be no reported case which has decided that the subject is entitled to compensation for lands taken by the Crown in purported exercise of the Prerogative, but to this circumstance the same observation applies. The point that no suppliant has presented a Petition of Right with such an object seems to me to be of minor importance. Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that the absence of contest and even of protest is by no means always an admission of the right. In a lesser degree, I see no reason why similar courses may not have been taken in times of less gravity. At any rate the fact remains that the claim of Prerogative right maintained by the appellant is one of the exercise of which history has preserved no record.

As to the judgment in *The Zamora*,<sup>1</sup> I concede what was there said to have been correct, but I think that it has been pressed beyond anything for which, truly understood, it is an authority. What has to be borne in mind is that no issue as to the Royal Prerogative arose for determination in that case. The question was, whether it was consistent with the law of nations that a Court of Prize should release to the Crown, against deposit of the value in Court, the property of a neutral held in its custody pending adjudication, whenever the Crown duly declared that it was necessary for the defence of the Realm to requisition it. As part of the reasoning of the judgment their Lordships dealt with

<sup>1</sup> (1916) 2 A.C. 77.

two points : First, that such requisitioning imposed no greater burden on the neutral than was borne by the subject, but rather less ; and, second, that, if on comparison of the municipal laws of different countries the power of requisitioning was found to be exercisable in some cases with compensation and in some without (of which latter class this country was an example (page 100)), this circumstance would only show that the right contended for was, as against the neutral, as moderate as any municipal law warrants, and more so than what is warranted by our own. The legislation on the subject of national defence was not material, and was not discussed. I think it is plain that the judgment in *The Zamora* made and could make no attempt to formulate an exhaustive definition of the Prerogative as to requisitioning ; that it took and could only take decisions on the subject as it found them, in order to draw from them legitimate inferences throwing light on the matter in hand. The *Shoreham case*,<sup>1</sup> as it is now called, for obvious reasons meagrely reported as to the facts under the name of *In re a Petition of Right*, was the most recent exemplification of the ancient rule traced back to the Year Books that for the purpose of repelling invasion the King, and indeed the subject too, may enter another's close in order to raise bulwarks therein without committing a trespass. Rightly or wrongly, the facts of the *Shoreham case*<sup>1</sup> were assumed to have been analogous to the case of raising bulwarks. No question arose of the taking of buildings for the mere use of administrative officials, although employed in one of the combatant branches of the administration. The statement about the absence of compensation was an exact statement of the state of the reported cases then existing. It did not purport to lay down that no right to compensation could exist in law, but merely recorded that none had been decided to exist. The statement that no Court ought, in time of war, to require of the officers of the Crown proof (*ex hypothesi* public proof) of the reasons of State which had led them to hold that—in a particular case—a certain course should be taken, seems to me to be an obvious statement. It is not in conflict with what seems to me to be an equally obvious proposition, namely, that, when the Court can see from the character and circumstances of the requisition itself that the case cannot be one of imminent danger, it is free to inquire whether the conditions, resting on necessity, which are held to exist in the *Shoreham case*,<sup>1</sup> are applicable to

<sup>1</sup> *In re a Petition of Right* (1915) 3 K.B. 649.

the case in hand. If so, the argument, in the judgment of *The Zamora*,<sup>1</sup> did not touch such a case. Unless the Court has such a power, the mere fact that the competent military authority honestly believed that what he demanded was needed for the defence of the Realm, would, on the Appellant's argument, enable everything to be taken and nothing paid. Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case*; but there is a difference between things belonging to that category of urgency, in which the law arms Crown and subject alike with the right of intervening, and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown.

My Lords, I think that the judgment of the Court of Appeal was in accordance with the law, and ought to be affirmed.

LORD PARMOOR: My Lords, the question in debate in this Appeal is whether the respondents are entitled to rent or compensation for the temporary use and occupation of the De Keyser's Royal Hotel on the Thames Embankment. Possession of the hotel was taken during the war by the Executive Government as representing the Crown for purposes admittedly connected with the defence of the Realm. It is not necessary to restate in detail to your Lordships the negotiations and letters which passed between the representatives of the Executive Government and the respondents in connexion with taking possession of the hotel.

On May 8, 1916, Mr. Fane, of the Office of Works, attended at the hotel to take over possession from Mr. Whinney who delivered possession by giving the keys to Mr. Fane. Mr. Whinney protested against the proceedings and only surrendered possession under protest. It was stated that the Office of Works did not recognize any claim for occupation rent and required that any claim for compensation should be sent to them for transmission to the Defence of the Realm Losses Commission, and that the premises had been commandeered for military purposes under the Defence of the Realm Acts. It is contended by the appellant that compensation, if payable at all, is only payable *ex gratia* at the discretion of the Commission and not as

<sup>1</sup> (1916) 2 A.C. 77.

a matter of legal claim. This Commission was appointed to inquire and report to the Treasury with regard to claims for direct and substantial loss and damage 'in cases not otherwise provided for'. In my opinion the case under appeal is a case 'otherwise provided for', and therefore a case which the Commission would have no jurisdiction to entertain. On February 14, 1917, the respondents presented a Petition of Right alleging that Mr. Whinney had delivered up possession of the hotel to representatives of the Crown and that the use and occupation thereof by the Executive Government was by permission of the respondents, and they claimed a sum as rent in respect thereof. Having come to the conclusion that the representatives of the Crown took possession under rights conferred by statute, it is not necessary to determine whether or not there was any use and occupation of the hotel by permission of the respondents. The respondents further claimed that they were entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842, and it is under this head that a declaration has been made by the Court of Appeal in their favour. On October 15, 1917, the Attorney-General filed his answer and plea on behalf of His Majesty, traversing the allegation in the Petition that Mr. Whinney voluntarily delivered up possession of the hotel to the representatives of the Crown and that the Crown's use and occupation of the hotel was by permission of the respondents, and pleading that such possession was properly and lawfully taken by virtue of His Majesty's Royal Prerogative, as well as by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the regulations issued thereunder, and that His Majesty had acquired no right in or over the premises beyond the right to take and use the same for so long as might be necessary for securing the public safety in the defence of the Realm during the continuance of the war. Mr. Justice Peterson dismissed the Petition with costs, but this judgment was reversed in the Court of Appeal and a declaration made that the respondents were entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.

The first question raised and argued at great length before your Lordships was whether the Executive Government could justify their action in taking possession of the hotel without payment of rent or compensation, under the sanction of the Royal Prerogative. The Royal Prerogative connotes a discretionary

authority or privilege exercisable by the Crown or the Executive which is not derived from Parliament and is not subject to statutory control. This authority or privilege is in itself a part of the Common Law, not to be exercised arbitrarily but *per legem* and *sub modo legis*. In the present Appeal it is not alleged that if the Royal Prerogative did authorize the taking of possession of the premises of the respondents for temporary use and occupation without payment of rent or compensation, the authority was used improperly or in an arbitrary manner. Under this head no objection is put forward. The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the Executive, and in the extension of Parliamentary protection in favour of the subject under a series of statutory enactments. The result is that whereas at one time the Royal Prerogative gave legal sanction to a large majority of the executive functions of the Government, it is now restricted within comparatively narrow limits. The Royal Prerogative has, of necessity, been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion. A similar tendency may be traced in the growth of our legal system. Portions of the Common Law have been systematically incorporated in or modified by Acts of Parliament, and in this way the obligations which the law imposes have become more definite and more certain in their application. Apart from the implication from precedents which will be referred to later, the appellant states that he relied on the Royal Prerogative, because in a case of necessity for the public defence the Crown has by the Common Law a Prerogative Right which has not been abated, abridged, or curtailed by any of the Defence Acts of 1842-73, or by any other statute, to enter upon, or take possession of, or to occupy and use the land of any subject without payment of compensation. It is not necessary to inquire how far in certain cases of necessity for public defence the Executive has power to act without statutory authority, but a generalization of this wide character requires careful analysis in its application to special conditions such as have arisen in the present Appeal. In this instance the De Keyser Hotel was required for administrative purposes. Under modern conditions the use and occupation of land for administrative facilities is a matter of necessity for public defence, but the necessity is not of the same character and cogency as arise when the use and occupation of land is required on the occurrence of invasion or during the occurrence



of actual fighting. On this point I agree with the decision of the Court of Appeal. Assuming that there is a public necessity to take possession of land for administrative purposes in connexion with public defence, there can be no reason why this necessity should be urged as an answer to a claim for compensation. It is clear on the negotiations and correspondence that Mr. Whinney did not raise any objection to handing over the hotel for the use and occupation of the Executive Government, but that his protest was limited to the claim of the Executive Government to take this action and at the same time to deny any claim for compensation except such as might be offered, as a matter of grace, by a reference to the Defence of the Realm Losses Commission. An illustration of the distinction which arises in the character and cogency of the necessity when land or buildings are required for the exigency of the public service is to be found in section 23 of the Defence Act, 1842,<sup>1</sup> which provides certain safeguards for the protection of the subject unless the enemy shall have actually invaded the United Kingdom at the time when the lands or buildings have been taken. It is further noticeable that the Prerogative Right claimed is limited to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land of any subject without payment of compensation. It is not claimed that it can be extended to a case of disseisin. Since Magna Carta the estate of a subject in lands or buildings has been protected against the Prerogative of the Crown. It is not easy to see what the distinction is between disseisin and an indefinite use and occupation which may extend beyond the estate of any particular owner. The later statute law gives the same claim to compensation to the subject in either case. An analogy arises in the case of taxation. Money is of primary necessity for public defence during war, but it has long been established that in order to obtain the requisite supplies the Executive must follow constitutional precedent and obtain Parliamentary sanction. If, however, it could be established that there had been at one time such a Prerogative Right as is claimed by the appellant, I am unable to accept the further proposition that such a right has not been abated, abridged, or curtailed by any of the Defence Acts, 1842-73, or any other statute. The provisions, however, of the statute law, as they affect the Royal Prerogative which the appellant claims, will be considered subsequently.

<sup>1</sup> 5 & 6 Vict., c. 94.

The precedents on which the appellant relies in support of his Appeal are *R. v. Hampden*,<sup>1</sup> the *Case of Saltpetre*,<sup>2</sup> *Hole v. Barlow*,<sup>3</sup> and *The Zamora*.<sup>4</sup> No one would dispute the high character of the arguments of Mr. St. John against the Crown in the case of ship money, but admissions made in such an argument do not constitute precedents, and the arguments applicable to the Royal Prerogative before the revolutionary period must be read subject to the restrictions which have been subsequently imposed. Lord Justice Duke in his exhaustive review<sup>5</sup> refers to the judgments of two of the Judges whose opinions were given adversely to the claim of the Crown, and quotes passages from the judgments of Mr. Justice Crooke and Mr. Justice Hutton. The quotation from Mr. Justice Crooke is: 'The law provides a remedy in case of necessity and danger, for then the King may command his subjects without Parliament to defend the kingdom. How? By all men of arms whatsoever for the land, and by all ships whatsoever for the sea, which he may take from all parts of the kingdom and join them with his own navy, which has been the practice of all former Kings.'<sup>6</sup> This opinion of Mr. Justice Crooke would, in any case, be no precedent for the claim made in the present Appeal, but it is doubtful whether the Royal Prerogative would at the present time cover so wide an exercise of authority. During the war a Conscription Act was passed, and Parliamentary authority was obtained. The quotation from Mr. Justice Hutton is: 'The King is bound to defend the kingdom.'<sup>7</sup> There is no need to question the accuracy of this general statement, but it cannot be intended to cover the proposition that the Executive Government is entitled, without regard to the limitations which have been imposed from time to time, to take all such steps as in the discretion of the Government for the time being may be considered necessary for this purpose.

The *Saltpetre Case*<sup>2</sup> was decided in 1606, at a time when the claim to act by Royal Prerogative was carried to an extreme limit. This case, however, is no precedent for the contention put forward by the Appellant. The saltpetre was taken under the Right of Purveyance, and payment was made. Purveyances were abolished in 1660 by 12 Charles II, c. 24. The volume of extracts from Public Records made for the purposes of this case by the Record Agent contains warrants for the searching for

<sup>1</sup> (1637) 3 How. St. Tr. 825.<sup>2</sup> (1606) 12 Rep. 12; 77 E.R. 1294.<sup>3</sup> (1858) 4 C.B. (N.S.) 334; 140 E.R. 1113.<sup>4</sup> (1916) 2 A.C. 77.<sup>5</sup> (1919) 2 Ch. 238.<sup>6</sup> 3 How. St. Tr. 1134.<sup>7</sup> Ibid. 1195.

saltpetre, but in every case on the payment of rent or compensation. The importance of the case consists in the terms of the resolution of the Judges: 'When enemies come against the Realm to the sea coast it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the Realm, for every subject hath benefit by it. And therefore by the Common Law every man may come upon my land for the defence of the Realm, as appears by 8 Edward IV, 23, and in such place on such extremity, they may dig for gravel for the making of bulwarks: for this is for the public, and every one hath benefit by it, but after the damage is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance; and for the commonwealth a man shall suffer damage: as for the saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down: and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Henry VIII, Fol. 15.' A right common both to the Crown and all subjects is not in the strict sense a Prerogative Right of the Crown. Royal Prerogative implies a privilege in the Crown of a special and exclusive character, but in any case the illustrations contained in the Resolution cannot be relied upon in support of the claim made by the appellant. To take premises for administrative purposes is essentially different from an entry upon land adjoining to the coast to protect the realm from a landing by enemy forces. The analogy of plucking down a house if the next be on fire for the saving of a city or town is an apt instance of the restrictive limitations under which the right referred to in the Resolution can be exercised, and it would be impossible to suggest that any subject would have been entitled to take possession of the hotel of the respondent for temporary use and occupation. A Statute<sup>1</sup> of 4 Henry VIII, c. 1 (1512), which was to endure to the next Parliament makes special provision for the protection of the County of Cornwall against invasion from Bretayne and also the Haven of Brest, and authorizes every one of the King's subjects under the conditions mentioned to enter upon land for the making of bulwarks, &c., without any manner of payment to be demanded or any manner of action, by any manner of person or persons at any time thereafter to be attempted. This statute illustrates the nature of a right which is based, not on an exclusive

<sup>1</sup> App. B, p 220, *post*.

privilege of the Crown, but on the duty of all subjects within the specified area to make common cause in defence of the Realm. Lord Justice Duke refers to a series of cases between subjects in which there was no determination of the rights as between the Crown or the Executive Government and the subject. The decisions in these cases do not, in my opinion, assist to solve the questions raised in this Appeal.

*The Zamora*<sup>1</sup> was a prize case which raised a question of the authority of Royal Prerogative in International Law and of the right to requisition vessels or goods in the custody of the Prize Court of a belligerent power. As regards the authority of the Royal Prerogative the dictum of Lord Stowell in *The Fox*<sup>2</sup> was disapproved and it was held that, prior at any rate to the Naval Prize Act, 1864, there was no power in the Crown by Order in Council to prescribe or alter the law which Prize Courts have to administer. So far the case cannot be quoted in favour of the claim to take possession of the property of the subject without payment of compensation. In the course of his judgment, Lord Parker does incidentally refer to the authority of the Royal Prerogative within the domain of municipal law, but this was not a matter in issue in the case, and there was no argument addressed to the question now in appeal before your Lordships. So far as the *Shoreham Case* is concerned, it need only be added that Lord Parker was sitting in your Lordships' House when the arrangement was come to which made a formal judgment unnecessary. The dictum of Mr. Justice Willes in *Hole v. Barlow*,<sup>3</sup> is not in favour of the contention of the appellant. It states the general proposition that every man has a right to the enjoyment of his land, and then by way of illustration limits the application of the power of the Royal Prerogative to the event of a foreign invasion. Apart from legal precedent, it was urged by the appellant in the Court of Appeal during the argument, that where lands had been taken over for temporary use and occupation for the purposes of the defence of the Realm without obligation on the part of the Crown to pay rent or compensation, special commissions had been issued from time to time to determine what payment should be made by the Crown *ex gratia*. Consequently a search was made, with the result stated in the judgment of the Master of the Rolls. 'The result of searches which have been made is that it does not appear

<sup>1</sup> (1916) 2 A.C. 77.

<sup>2</sup> (1811) Edw. 312.

<sup>3</sup> (1858) 4 C.B. (N.S.) 345; 140 E.R. 1118.

that the Crown has ever taken subjects' land for the defence of the country without paying for it, and even in the Stuart times I cannot trace any claim by the Crown to such a prerogative.' These latter words are important in considering the claim of the Executive Government in the present case to act under the Royal Prerogative. If no precedents can be found prior to the year 1688 of a claim to use and occupy the land of the subject for an indefinite time without the payment of compensation, it would be improbable that such precedents would be found at a later date.

The documents and warrants extracted from Public Records give no support to the claim put forward by the appellant. A large number of them are concerned with the acquisition of estates in land which admittedly could not be acquired compulsorily by the exercise of the Royal Prerogative. In some of the instances it is difficult to determine whether an estate in the land was acquired or possession was taken for temporary use and occupation. The extracts to which the attention of your Lordships was specially directed during the argument are as follows: On November 24, 1668, and on December 22, 1688, there are two Ordnance Minutes<sup>1</sup> ordering in one case the payment of rent for ground upon which a battery is standing, and in the other case compensation for damage at the time of 'Ye proveing the Morter Peece nere Bishoppes hall'. Both these minutes appear to relate to a case of temporary use and occupation. On September 4, 1805,<sup>2</sup> a letter was written urging the necessity of obtaining the mills at Cheshunt for purposes of increasing the supplies of gunpowder for His Majesty's service. The Board concurred in the opinion, and recommended to the Master General to authorize the mills of Cheshunt to be taken possession of under the Defence Act, which will be attended also with the further advantage of removing some legal obstacles arising from a claim of the poor of the neighbourhood to have their corn ground at the mill. Proceedings were accordingly taken under the Defence Act to get possession of the mills, in order that by the acquisition of the water the manufacture of gunpowder might be increased. The subsequent orders and minutes relate to valuation for the purchase of all interests in the premises. At this date the Act 43 Geo. III, c. 55, was in force, authorizing His Majesty to survey and mark out ground wanted for public service and to treat and agree for 'possession

<sup>1</sup> App. F, pp. 284, 285, *post*.

<sup>2</sup> *Ibid.*, p. 291, *post*.

and use of it during such time as the exigence of the public service shall require', and in default of agreement compensation to be paid for possession and use, to be ascertained by the jury. In the following year a further Act was passed enabling land required for the exigencies of the service to be purchased absolutely and for ascertainment of the price by a jury in default of agreement. These Acts were temporary in character, but contained provisions similar to those which were made permanent in the Defence Act, 1842. On June 20, 1813,<sup>1</sup> a report was made on the claims of a Mr. Cowel, of Margate, and other persons in reference to damage done by stopping up gateways by which farmers drew up seaweed from the beach as a manure for lands, at a time when an enemy landing was apprehended. A money payment appears to have been made in each case, with the further recommendation that the gateway should be reopened at the expense of the Government. It was stated at the hearing before the Court of Appeal that the documents which had been extracted were illustrative, and that there was no reason for thinking that a further search would disclose documents of a different import. The conclusion is that the Executive Government has not established a right under the Royal Prerogative to take the hotel of the respondents for temporary use and occupation during war without payment of compensation or by referring the respondents to a Commission which could only make grants *ex gratia* within the limits of its jurisdiction.

I am further of opinion that the plea of the Appellant that the Prerogative Right of the Crown, whatever it may have been, has not been abated, abridged, or curtailed by any of the Defence Acts, 1842-73, or by any other statute, cannot be maintained. I propose to examine the main statutory provisions which regulate the rights of the subject and the obligations of the Executive when lands or buildings are taken temporarily for use and occupation on the occasion of a public exigency. The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under parliamentary control and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. I think that the statutory provisions applicable to

<sup>1</sup> App. F, p. 293, *post*.

the interference by the Executive with the land and buildings of the respondents bring the case within the above principle. It would be an untenable proposition to suggest that courts of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. They may be taken away or abridged by express words, by necessary implication, or, as stated in Bacon's Abridgement, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong. Statutes which provide rent or compensation as a condition to the right of the Executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the regulation must be obeyed, and that, as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can be no longer enforced.

In 1798 (38 Geo. III, c. 27) power is given to take possession of land during such time as the exigencies of public service should require, with a provision for compensation; but this Act was limited in its operation to the continuance of the then present war. In 1803, by 43 Geo. III, c. 55, similar powers are given. This, again, was a temporary Act during the then present war with France. A doubt arose whether this Act would enable the Executive to take land for a definite period of time extending beyond the immediate exigency. In consequence, it was repealed in 1804, and 44 Geo. III, c. 95, enacts that land may be acquired either by absolute purchase for public service or for use and possession during such time as the exigence of the public service may require. Sections 11 and 12 provide compensation either for purchase of land or for its temporary use. In 1842 the Defence Act<sup>1</sup> was passed to consolidate and amend the laws relating to the services of the Ordnance Depart-

ment and the vesting and purchase of lands and hereditaments for those services and for the defence and security of the realm. This Act has been subsequently amended, but not on any subject material to this Appeal prior to 1914. Section 16 empowers the principal officers of Her Majesty's Ordnance to treat and agree with the owner or owners of lands, buildings, and hereditaments, or with any person or persons interested therein, either for the absolute purchase thereof or for the possession or use thereof during such time as the exigence of the public service shall require. Section 19 enacts that if bodies or other persons thereby authorized to contract on behalf of themselves or others or other person or persons interested in any such lands, buildings, or other hereditaments, shall for the space of fourteen days next after notice in writing decline to treat or agree, or shall refuse to accept such sum of money as shall be offered for absolute purchases, or such annual rent or sum as shall be offered for hire, or rent thereof either for a time certain, or for such period as the exigence of the public service may require : the principal officers may require two or more justices of the peace, or other authority named, to put them or any person appointed by them into immediate possession of such lands, buildings, or other hereditaments. Then follows a complete provision for summoning a jury to assess the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof as the case may be.

Section 23 provides that no such lands, buildings or other hereditaments shall be taken without the consent of the owner or owners or other interested person or persons unless the necessity or expediency of the taking the same has been certified as directed or 'unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings or other hereditaments shall be taken'. This latter provision is important since it clearly shows that the Legislature was providing against such an emergency as invasion which might occur during a period of war and introducing in such a case an exceptional procedure. Section 34 empowers the principal officer of Her Majesty's Ordnance to bring actions, suits or other proceedings, provided that in all such actions, suits or other proceedings, the legal rights, privileges and prerogatives of Her Majesty, Her heirs and successors shall not be defeated or abridged. It is not alleged that procedure by Petition of Right defeats or abridges the legal rights, privileges or prerogatives of the Crown



if the conditions are such as entitle the respondent to resort to this form of procedure. If this Act and the amending Acts prior to 1914 had stood alone it would have been no answer to say that the statutory conditions were inconvenient or unduly cumbrous to meet the exigency of the public service in defence of the realm. It is for Parliament to determine what the exigency of the public service may require and, if amending provisions are found to be necessary, to enact them in an amending statute. It will appear subsequently that this course was followed on the outbreak of the war in 1914.

It was further argued on behalf of the appellant that, apart from the Royal Prerogative or from any power vested in the Executive under preceding statutes, a subject was deprived of his right to compensation by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914,<sup>1</sup> and of the regulations issued thereunder. Under this Act 'His Majesty in Council has power, during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm'. There is a special provision that such regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws or any other power under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1891 to 1903. The regulations issued authorize the competent Naval or Military Authority, and any person duly authorized by him, where for the purpose of securing the public safety or defence of the realm it is necessary so to do, to take possession of any land, building, or other property, or to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid. The effect of this regulation is to enable the competent Naval or Military Authority to take immediate possession of land or buildings where it is necessary for securing the public safety or defence of the realm. In Regulation 62 the competent Naval or Military Authority may be any commissioned officer not below the rank of a Lieutenant-Commander in the Navy or Field Officer in the Army or Air Force. There is no provision for compensation for acts done under the powers conferred by Regulation 2. Nor is any such provision necessary. Compensation was already assured under statutory enactment. Regulation 2B does contain a method of determining the price to be paid on taking possession of war material, food, forage, and stores in default of agreement,

<sup>1</sup> 5 Geo. V, c. 8.

and the attention of your Lordships was not called to any preceding statute containing a right to compensation. My Lords, I agree in the view expressed by Lord Justice Warrington, that the Defence Acts, 1842 to 1873, and the Act of 1914, and the regulations made thereunder, must be read together. The power to take possession of land or buildings for temporary use or occupation is derived from the Defence Act, 1842, and the Act of 1914, and the regulations made thereunder. The Act of 1914 and the regulations made thereunder adapt the exercise of the powers conferred by the Defence Act of 1842 to the exigencies of modern warfare during a period of war; but they do not affect the provisions of the Defence Act which confer a right to compensation and provide procedure for assessment of the amount in default of agreement. I think that there is no difficulty in applying the ordinary rules of construction, but if there is room for ambiguity, the principle is established that, in the absence of words clearly indicating such an intention, the property of one subject shall not be taken without compensation for the benefit to others or to the public (*Attorney-General v. Horner*<sup>1</sup>; *London and North-Western Railway Company v. Evans*<sup>2</sup>). So long as the possession of land or buildings can immediately be taken for purposes of public safety there is no inconsistency in subsequently determining under statutory procedure the amount of payment either by way of rent or compensation. It is not necessary in your Lordships' House to distinguish the present Appeal from *In re a Petition of Right*, 1915.<sup>3</sup> Mr. Justice Peterson thought that the present case was covered by the judgment of the Court of Appeal in that case, but when that case came before your Lordships' House an arrangement was made rendering it unnecessary to give a formal judgment.<sup>4</sup>

The Appellant, in the statement of contentions tabled in the appellant's case, claimed 'that the Legislature had by the Defence of the Realm (Acquisition of Land) Act, 1916,<sup>5</sup> recognized the existence of and had confirmed the Prerogative'. Reliance is placed on the words in section 1, which allows the Government Department in possession of lands to continue in possession for the specified time, where possession had been taken whether in exercise or purported exercise of any Prerogative Right of His

<sup>1</sup> (1884) 14 Q.B.D. 245.<sup>2</sup> (1915) 3 K.B. 649.<sup>5</sup> 6 & 7 Geo. V, c. 63.<sup>2</sup> (1893) 1 Ch. 16.<sup>4</sup> (1916) W.N. 311.

Majesty, or of any powers conferred by or under any enactment relating to the defence of the Realm. This section does not enlarge or extend the Royal Prerogative in any direction, or deprive the subject of compensation if, apart from this section, he would have been entitled to claim it. In the letter of May 9, 1916, the Controller of Supplies states that the premises have been commandeered by the Military Authorities under the Defence of the Realm Act, and this statement is, in my opinion, well founded.

If the respondents are entitled to a declaration in the terms of Head No. 4 of the Petition of Right, the proper form of procedure to obtain such a declaration in favour of a subject against the Crown has been followed. There is no allegation of any tortious conduct on the part of the Crown. On the contrary, the claim to compensation assumes that the entry on and the taking of possession of the hotel are acts which are legally justifiable. In an ordinary case under the Lands Clauses Acts, when promoters enter into possession of lands in conformity with their statutory rights and delay or refuse to put in force the necessary procedure for the assessment of compensation in default of agreement, the remedy is by Mandamus. The remedy would not be applicable against the Crown. I did not understand the Attorney-General to raise any objection to the Procedure by Petition of Right if the respondents could establish a claim to compensation, or to the form of the declaration made by the Court of Appeal.

My Lords, in my opinion, the Appeal should be dismissed with costs.

Questions put :

That the Order appealed from be reversed ?

The Not Contents have it.

That the Order appealed from be affirmed and this Appeal dismissed with costs ?

The Contents have it.

## APPENDIX B

STATUTES NOT PRINTED IN RUFFHEAD'S  
EDITIONPUBLIC RECORD OFFICE. PARLIAMENT ROLLS  
No. 133. (10.)*(Statutes of the Realm, iii. 48.)*

ACT OF PARLIAMENT. 4 HENRY VIII. CAP. 1. A.D. 1512

For making Bulwarks

*Rotulus Parliamenti de Anno Regni Regis Henrici Octavi  
Quarto, A.D. 1512*

Prayen the Comons in this present parliament assembled that for asmoch as the land of Bretayne and also the haven of Brest lyeth streight ayenst the south see costes of the Countie of Cornwall and that the frenchemen our auncien enemyes and Bretaynes enemyes by reason of their fysshing upon the se costes knowe aswell every haven and creke within the sayde Countie as every landyng place in as large maner as any subgiectt of our Sovereigne Lorde the Kyng dooth ; And that the said Countie is thre score and ten myle in length and the substance thereof right litle more than six myle in brede from the southsee to the northsee, by reason whereof they also knowe that grete multitude of people can not shortly resort to put theym of at their landyng ; And that in divers and many of the seyd landyng places nother pile blokhouse ne Bulwark is made to greve or annoye theym at their landyng : Whiche consideracions unto our sayd enemyes grete audacite comfort and corage gyveth to arrive and land in the same parties, to the grete annoyance of our Sayd Sovereigne Lorde's subgiettes there and to the utterly undoyng of dyvers and many of theym oonles a remedie be the soner provyded : Therfor be it enacted by the Kyng our Sovereign Lord his Lordes Spirituell and temporell and the Comons in this present parliament assembled and by auctorite of the same that the Justices of the Peace and Shiref of the sayd Countie do ride and viewe all the sayd south cost from Plymmouth westward, to the Landes end. And that doone incontynent to appoynt within theym self such boroughes townes and parissheas as they shall thinke resonable to make bulwerkes brayes walles diches and al other fortificacions for the same cause in maner and forme and

facion as shalbe thought by theire discrecion in every of the sayd landyng places betwene this and the first day of Marche next now cōmyng.

And ferder be it enacted by the sayd auctorite that every Maire and Constable of the sayd countie by the sayd Justices of Peace or Shirief appoynted do cōmaunde all the inhabitantes within the precyncte of theire office, to bee at the see side with such instrumentes as they have or can gett for the makynge of the sayd bulworkes and other the premisses in such landyng places as shalbe assigned by the sayd Justices of the Peace or Shirief, and that the said Maire or Constables do cōmytte to warde all such wilfull persones as will not obey, cōme nor send any oder person to the see side to make the sayd Bulworkes and oder the premisses at the day and tyme by the said Maire or Constables to be appoynted, and there to remayne without baile or maynprise by the space of x daies or lesse at the discrecion of the sayd Maire or Constables. And if any of the sayd Maires or Constables do not theire dutie as is aforesayd that then the Justices of the Peace next adjoyning do cōmytte to warde the same Maire or Constable so offendyng, there to remayne without baile or maynprise by the space of a moneth or lesse at the discrecion of the Justice of Peace.

And be it also enacted by the sayd auctorite that goode and substanciall bulworkes brayes walles diches and all oder fortifications in every landyng place in maner forme and facion as is aforesaid, as well from Plymouth aforesayd, by the se costes estward as in all other parties within the realme of Englund, be made there as the Justices of the peace and Shirief within that shire where any such landyng places be shall thynke nedefull. And that every Justice of Peace Maire and Constable within every shire where any such landyng places be, have like and as good auctorite by this present acte to cōmaunde the inhabitantes of every borough towne and parisshe adjoynyng to the see side or els where after the discrecions of the Justices of Peace, to make the sayd bulwerkes and other the premisses and also to cōmitte to warde all such wilfull personnes as will not obeie in like maner as the Justices of the peace Maires and Constables of the sayd Countie of Cornwall may do bi any of the actes aforesaid.

And over this be it enacted by the sayd auctorite that it be lafull for every of the Kynge's subgiettes within this Realme of Englund by thadvyse and assignement of the sayd Justices of the Peace or Shirief to make all maner of bulwerkes and oder

the premisses in every mannys grounde of what astate or degree he be of and also to digge and to delve aswell for erth stones and turfes as to cutte and to hew heth in any mannes grounde for the making of any such bulworkes and other the premisses as ofte and as many tymes as nede shall require, and the sayd erth stones turfes and heth to take occupie and carrie away out of the sayd ground to any oder mannes grounde for making of any such bulwarkes and other the premisses in whos grounde so ever the sayd erth stones turfes and heth happen to be without any interupcion or lett of any person or persones beyng lord or lordes of any such grounde or having any oder interest in the same, And without any maner of payment to be demaunded for any of the premisses or any maner of accion bi any maner of person or persones at any tyme hereafter to be attempted or in any wise mayntened ayenst any of the Kynge's subgiettes for any such matier or cause. And this acte to endure to the next parliament.

Responsio—le Roy le vult.

[*Endorsed*]

Rotulus Parliamenti prorogati usque quartum diem Novembris anno regni Regis Henrici octavi quarto et postea de die in diem usque vicesimum diem Decembris extunc proximo sequentem continuati et extunc usque septimum diem Novembris proximo sequentem prorogati.

ANNO QUARTO.

#### STATUTES OF THE REALM. 14 CHARLES II. CAP. 20

An Act for providing carriage by land and by water for the use of his Majesty's Navy & Ordnance.

WHEREAS by an Act entitled an Act for taking away the Court of Wards and Liveries and Tenures in capite and by knights' service and purveyance, and for settling a revenue upon His Majesty in lieu thereof, it was amongst other things enacted, for the reasons and recompense therein expressed, that from thence forth no person or persons by any warrant, commission or authority under the Great Seal or otherwise by colour of buying or making provision or purveyance for His Majesty or any Queen of England for the time being, or of any the children of any King or Queen of England that shall be or for his, their

or any of their household, shall take any cart, carriage or other thing whatsoever of any of the subjects of His Majesty, His heirs or successors without the free and full consent of the owner or owners thereof, had or obtained without menace or enforcement, nor shall summon, warn, take use or require any of the said subjects to furnish or find any horses, oxen or other cattle, carts, ploughs, wains or other carriages for the use of His Majesty, His Heirs and successors, or of any Queen of England or any child or children of any the Kings or Queens of England for the time being, for the carrying the goods of His Majesty, His Heirs or successors or the said Queens or children or any of them, without such full and free consent as aforesaid, any law, statute, custom or usage to the contrary notwithstanding, Be it notwithstanding enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that from and after the four and twentieth day of June in the year of Our Lord, one thousand six hundred sixty and two, as often as the service of His Majesty's Navy or Ordnance shall require any carriages by land within the Kingdom of England, and dominion of Wales and town of Berwick upon Tweed, upon notice given in writing by warrant under the hand and seal of the Lord High Admiral of England for the time being or under the hands and seals of two or more of the principal officers or commissioners of His Majesty's Navy, or under the hand and seal of the Master of His Majesty's Ordnance for the time being, or under the hand and seal of the lieutenant of [His] Majesty's Ordnance for the providing of carriages for the respective service of the Navy or Ordnance unto two or more Justices of the Peace dwelling near unto the place where the said carriages shall be required, the said Justices of the Peace may and shall immediately issue forth their warrants to such of the adjacent parishes, hundred or divisions as they shall judge fit within their respective counties or divisions, not being above twelve miles distant from the place of lading for the sending to a certain place and at certain times (to be specified and appointed in the said warrants) such numbers of carriages with horses or oxen sufficient for the said service as by the Lord High Admiral of England for the time being or by the master or lieutenant of His Majesty's Ordnance for the time being, or by the principal officers or commissioners of His Majesty's Navy respectively as abovesaid shall be, by writing under their hands and seals, required, the

owners of which carriages or their servants shall receive for every load of timber per mile, one shilling for every reputed mile which they shall go laden, and for other provisions, the sum of eight pence per mile for every ton they shall carry.

And be it further enacted by the authority aforesaid that it may and shall be lawful for the Lord High Admiral of England for the time being by warrant under his hand and seal and also for the principal officers and commissioners of His Majesty's Navy by warrants under the hands and seals of any two or more of them as also for the Master of His Majesty's Ordnance for the time being by warrant under his hand and seal, and also for the lieutenant of His Majesty's Ordnance by warrants under the hands and seals of either of them as often as the service of His Majesty's Navy or Ordnance respectively shall require any carriage by water, to appoint such person or persons as they shall judge fitting to impress and take up such ships, hoys, lighters, boats or any other vessel whatsoever as shall be necessary for the accommodation of His Majesty's said service, the owners of which said ships, hoys, lighters, boats or other water carriage aforesaid, or such as they shall appoint, shall receive for the hire of every such ship, hoy, lighter, boat or other vessel per ton according to the rates usually paid by merchants, from time to time, and in case His Majesty's officers and the owners of such ships, hoys, lighters, boats or other vessels shall not agree on the said rates, then the rate to be settled by the Brotherhood of Trinity House of Deptford, Strand.

And be it further enacted by the authority aforesaid that in case any of His Majesty's subjects of this Realm shall refuse or wilfully neglect, after reasonable notice, to make their appearance with sufficient carriages by land or to fit provide and furnish their ships, hoys, lighters, boats or other vessels for the service of His Majesty's Navy or Ordnance, as is before expressed, or shall after they shall have undertaken such service, neglect or delay the same, that then upon due proof and conviction of such refusal or neglect by the oath of the constable, or other officer or two other credible witnesses, before the said Justices of the Peace of the county or Maior or other chief officer of the city or corporation where he or they inhabit (which oath they shall have power to administer) for the land carriages and for the water carriages, by the oath of such person as shall be appointed by the Lord High Admiral, the principal officers or commissioners of His Majesty's Navy, the Master of His Majesty's Ordnance,



or the lieutenant of His Majesty's Ordnance, as aforesaid, or other two credible witnesses, before the principal officers or commissioners of His Majesty's Navy or Master or Lieutenant of His Majesty's Ordnance respectively (which oath they shall have likewise power to administer) the party so refusing or neglecting shall for every such refusal or neglect forfeit the sum of twenty shillings for the land carriage and for carriage by water treble the freight of such ship or vessel not exceeding fifty pounds in the whole, to the King's Majesty's use to be forthwith levied in default of payment upon demand by distress and sale of his goods and chattels by warrant from the said Justices of the Peace, Mayor or other chief officer or from the principal officers or commissioners of His Majesty's Navy or Master or lieutenant of His Majesty's Ordnance respectively (rendering to the parties the overplus upon every such sale if there should be any) the charge of distraining being first deducted.

Provided always that no horses, oxen, cart, wain or other land carriage shall be enforced to travel more days journey from the place where they receive their lading or be compelled to continue longer in the employment than shall be appointed by the Order of the said Justices of the Peace and that ready payment shall be made in hand for the said carriages at the place of lading without delay according to the aforesaid rates.

Provided always that in case any Justice of the Peace, Mayor, Chief Officer or Constable or any person or persons which shall be appointed by the Lord High Admiral, the principal officers or commissioners of His Majesty's Navy, the Master of His Majesty's Ordnance or the lieutenant of His Majesty's Ordnance as aforesaid respectively, shall take any gift or reward to spare any person or persons from making such carriage by land or by water or shall injuriously charge or grieve any person or persons through envy, hatred or evil will who ought not to make such carriage or shall impress more carriages than the necessity of the service shall require or than he shall be commanded to impress by his superiors, that then, upon due proof and conviction thereof, the parties so offending shall forfeit the sum of £10 to the party thereby grieved, who may sue for the same to be recovered by action of debt in any of His Majesty's Courts of Record, wherein no essoin, protection or wager of law shall be allowed, and in case any person or persons shall presume to take upon him or them to impress any horses, oxen, wains or carriages for land, or any ships, hoys, lighters, boats or other vessel for the service of

His Majesty's Navy or Ordnance other than the persons so empowered as aforesaid, then he or they so offending shall upon due conviction of the said offence, incur or suffer the punishment in the first recited Act.

Provided always, and be it enacted, that no ship, hoy, barge or any other vessel whatsoever, that shall be really and bona fide freighted by charter party if there be other vessels in the port fitting for the service, nor any vessel quarter laden with any goods, wares or merchandizes outward bound shall be liable to be impressed for any the services aforesaid, any thing in this Act to the contrary notwithstanding.

Provided that this Act and the powers therein contained shall continue and be in force until the end of the first session of the next Parliament and no longer, anything herein contained to the contrary in any wise notwithstanding.

Provided nevertheless that in regard of the more than ordinary charge and burden which the inhabitants of the New Forest in the county of Southampton, will be liable unto by reason of the quantities of timber usually felled and carried thence for the use of His Majesty's Navy, it shall and may be lawful for the Justices of the Peace, who shall by warrant summon the carts and carriages within the division of the New Forest in the county of Southampton aforesaid, to have power (as to the carriage of timber only) to allow as aforesaid to the several owners of such carts and carriages not exceeding fourpence per mile for so many miles as any cart or carriage so summoned shall go empty to the place of lading, anything in this Act contained to the contrary in any wise notwithstanding.

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An Act for vesting and setting the Fee Simple of certaine Lands on his Māt<sup>y</sup> his Heyres & Successors, which haue been taken into, & Spoyled by makeing new Fortifications, about the Towne of Portsmouth.

Anñ. 22<sup>o</sup> et 23<sup>o</sup> Car : 2<sup>di</sup> No. 43.

WHEREAS his Maiesty hath caused the Fortifications of his Towne of Portsmouth, in the County of Southampton, to be enlarged, and new Fortifications to be made there, and about the Dockyard neere the said Towne, in order to the rendring that Place more Defensible, for the doing whereof, the seuerall parcells of ground of, and belonging to the seuerall persons, and of the particular quantities, qualities, and yearly values, in a schedule hereunto annexed, mentioned, and expressed, haue been inclosed,

Spoyled, and taken away, as well within the said Workes, as by the Counterscarpes, and forelands belonging to the same, and other Damages haue been there done ; And whereas the Lords Comissioners of his Maiesties Treasury, being by Order of his Maiesty in Councell directed, to purchase the said Lands for his Maiesties vse, and to make satisfaction for the Damages aforesaid, and being certified by his Maiesties Surveyor Generall, that the Summe of Thirteene hundred and Nynety pounds, would be a sufficient compensation for the same, haue made an Agreement with Richard Norton of Southwicke in the County of Southampton Esq. (who is Owner of parte of the said Lands, and hath authority from the rest of the Owners, and persons concerned in the same, to make an Agreement, on their behalfe, for the purchase of the said Lands, and the said Damages) that in consideration of the said Summe of Thirteene hundred and Nynety pounds, to be payed to the said Richard Norton, for the vse of himselfe, and the rest of the Owners, Proprietors, and persons concerned in the said Lands, in full satisfaction for the purchase thereof, and for their said Damages, the said Lands shall be conveyed to his Maiesty, his Heyres and Successors, and that all persons, who haue done any injury to any of the said Owners of the said Lands, by reason of the making of the Fortifications aforesaid, shall be discharged of and from the same. And his Maiesty having approved of the said Agreement, hath, by his Letters of Privy Seale, directed the said Lords Comissioners of his Treasury to give order for payment of the said Thirteene hundred and Nynety pounds to the said Richard Norton, for the use aforesaid, when his Maiesty shalbe Legally vested and settled in the Possession of the said Lands, and for payment of the Interest thereof, in the mean time. And they haue thereupon given Order to the Officers of the Receipt of his Maiesties Exchequer, for payment of the same accordingly, Now for that the said Lands belong to many seuerall persons, who live in seuerall Places, some whereof are very remote, and the haueing particular Conveyances, and Assurances of their seuerall, and respective Interests in the same, from euery one of them, will be very troublesome, and a delay to the payment of the said purchase money, And to the intent the said money may be speedily paid to the said Richard Norton, for their vse, And for that the said Richard Norton for himselfe, and the said Owners, and Proprietors of the said Lands, hath consented, that the said Lands shalbe settled on his Maiesty, his Heyres, and

Successors by Act of Parliament, BEE it Enacted by the Kings most Excellent Maiesty, by and with the Consent of the Lords Spirituall, and Temporall, and of the Comons in this Parliament assembled, and by Authority of the same, That his Maiesty his Heyres and Successors shall, from henceforth, and for euer hereafter stand, and be seized of a good, sure, perfect, absolute, and indefeazible Estate of Inheritance in Fee Simple, of, and in all, and singular the Lands, Tenements and Hereditaments, in the Schedule hereunto annexed, mentioned, and of, and in euery part and parcell thereof, with their, and euery of their Rights, Members, and Appurtenances whatsoever, and that all and euery persons whatsoever (who by reason of the entring upon the said Lands, to make the said Fortifications as aforesaid, haue done any Trespasse, Damage, or injury whatsoever to any of the Owners, Proprietors, or persons concerned in the said Lands, or to their Corne, or Grasse standing, or growing, or which did stand & grow upon the said Lands) their Executors and Administrators and euery of them be, and are hereby acquitted pardoned, Released, and Discharged of, and from all such Trespasses, Damages, and injuries whatsoever, And of, and from all Actions, and suites and Cause and Causes of Actions, and Suites, already had or brought, or hereafter to be had or brought against them, or any of them, their or any of their Heyres, Executors, or Administr<sup>rs</sup> for, or in respect of the same.

A Particular of the Lands vested, and settled in his Maiesty, his Heyres and Successors by virtue of this Act.

*(Schedule of Lands Vested.)*

#### STATUTES OF THE REALM. 1 JAMES II. CAP. 11

An Act for reviving an Act for providing of carriages by land and by water, for the use of His Majesty's Navy and Ordnance.

WHEREAS an Act of Parliament was made and passed in the thirteenth and fourteenth years of the reign [of] His Late Majesty of Blessed Memory, entitled, An Act for providing carriages by land and by water for the use of His Majesty's navy and ordnance, which said Act is since expired.

And whereas the said Act hath been by experience found to be of necessary use and fit to be revived and continued, be it therefore enacted by the King's Most Excellent Majesty, by and with

the advice and consent of the Lords Spiritual and Temporal, and of the Commons, in this present Parliament assembled, and by the authority of the same, that the said Act and all and every the clauses, sentences and articles therein contained shall by virtue of this Act be revived and continued and have the full force, power and virtue of a law during the continuance of this Act.

And be it further enacted and declared by the authority aforesaid, that this Act shall continue and be in force during the space of seven years from the four and twentieth day of June, in the year of Our Lord 1685, and from thence to the end of the First Sessions of Parliament then next ensuing and no longer.

## APPENDIX C

### DOCUMENTS RELATING TO VESTING ACTS AND COMMISSIONS, INQUISITIONS, PROCEEDINGS, DECREES, ETC.

#### (1759.—PORTSMOUTH, CHATHAM, AND PLYMOUTH.)

Crown Office (Chancery) Commissions, Inquisitions, & Decrees relating to the purchase of land &c for the purchase of land for Fortifications No. 2.

GEORGE the SECOND by the GRACE of GOD of Great Britain France and Ireland King Defender of the Faith And so forth To our Right Trusty and Welbeloved Councillor Arthur Onslow Esquire Speaker of Our House of Commons Charles Marquis of Winchester James Marquiss of Carnarvon Lord Harry Powlet Lord George Sackville Sir William Courtney Baronet Sir John Barrington Baronet Sir Thomas Hales Baronet Sir Francis Henry Drake Baronet Sir Richard Warwick Bampfylde Baronet Sir William Gardiner Baronet Sir George Yonge Baronet Sir John Molesworth Baronet Sir James Creed Knight Henry Bilson Legge Lewis Watson Robert Fairfax Charles Yorke Charles Pratt James West Samuel Martin James Buller John Buller Richard Edgcombe Jonathan Rashleigh Richard Hussey John Harris Henry Reginald Courtney George Treby Browse Trist John Harris of Pickwell John Evelyn John Tuckfield John Rolle Walter Andrew Wilkinson Nicholas Haddock Isaac Townsend Charles Frederick Gabriel Hanger Mathew Robinson Morris the younger Charles Whitworth Alexander Thistlethwaite

Job Staunton Charlton Henry Penton Thomas Lee Dummer  
 Thomas Holmes Major General Holmes Harry Burrard Anthony  
 Langley Swymmer Charles Cocks Robert Bristow Henry Archer  
 William Rawlinson Earle Hugh Valence Jones William Glanville  
 Phillips Gybbon Henry Gould Thomas Stanyford William Davy  
 Philip Drake Thomas Bewes Frederick Rohers John Ommanney  
 William Basturd Thomas Neale John Parker William Eyre  
 John Richmond Webb Richard New Richard Hughes Pusey  
 Brooke John Peachy Thomas Missing John Moody John Gringo  
 William Yalding William Pescod Thomas Cooper James Best  
 Joseph Brooke Thomas Fletcher John Russell Roger Pilcher  
 Thomas Chiffinch Charles Petley John Cockain Sole Samuel  
 Eyre Charles Taylor Jacob Pickering John Hollis Richard Leigh  
 Francis Filmer Charles Robinson and William Hay Esquires  
 Greeting WHEREAS in and by One Act of Parliament made in  
 the last Session Entituled AN ACT for vesting certain Messuages  
 Land Tenements and Hereditaments for the better securing  
 His Majestys Docks Ships and Stores at Portsmouth Chatham  
 and Plymouth and for the better Fortifying the Town of Ports-  
 mouth and Citadel of Plymouth in Trustees for certain Uses and  
 for other Purposes therein mentioned It was Enacted that for  
 the better ascertaining the several Owners and Proprietors of  
 certain Lands therein particularly mentioned lying near the  
 Docks of Portsmouth Chatham and Plymouth which have been  
 made use of in making Intrenchments and raising Lines and  
 Fortifications for the Defence and Security of the said Docks  
 and their respective Titles and Claimes thereto It should and  
 might be Lawfull to and for Us by One or more Commission or  
 Commissions by Letters Patent under the Great Seal of Great  
 Britain to Authorize and Appoint any Number of Persons to  
 be Commissioners to hear and Determine all Titles and Claims  
 that shall or may be made to the said Lands Tenements and  
 Hereditaments or to any part or parcel thereof which Commis-  
 sioners so to be Appointed or any Five or more of them are  
 thereby Authorized and Required and shall and may in a sum-  
 mary manner Proceed Act and Determine by and upon the  
 Testimony of Witnesses upon Oath (Which Oath they or any  
 Five or more of them are thereby impowered to Administer)  
 Inspection and Examination of Deeds Writings and Records or  
 by Inquest of Twelve good and lawfull MEN TO BE Impanelled  
 and Sworn in manner therein mentioned and directed or by all  
 or any of the said Ways or otherwise according to their Direc-

tions all and all manner of Rights Estates and Interests and all Controversies Debates and Questions which shall happen and arise between any Person or Persons whatsoever or any other matter or thing relating to any of the Premises or any part thereof as in and by the said recited Act of Parliament amongst other things therein contained relation being thereunto had may more fully and at large appear NOW KNOW YE that we reposing especial Trust and Confidence in your Great Abilities Care Fidelity and Circumspection HAVE Nominated Constituted and Appointed And do by these presents Nominate Constitute and Appoint You

*(Here follow the names of Commissioners)*

or any Five or more of you to be Commissioners for Putting in Execution the said Act of Parliament And to you or any five or more of you as aforesaid We do by these Presents Give full Power and Authority to do Perform and execute or cause to be done Performed and executed all Powers Directions Clauses Matters and Things Whatsoever in the said Act contained HEREBY Willing and Requiring you or any Five or more of you as is aforesaid from time to time to proceed and act according to the Rules and Directions of the said Act of Parliament and diligently to Intend the execution thereof in all things as becometh AND these Presents or the Inrollment or Exemplification thereof shall be to you and every of you a sufficient Warrant and Discharge in that behalf IN WITNESS whereof we have caused these Our Letters to be made Patent WITNESS ourselves at Westminster the Twenty Seventh day of July in the Thirty Second Year of Our Reign

YORK & YORK

*(Here follow the signatures of six Commissioners)*

Inquisition indented had made and taken at the house of Timothy Bayly Scituate in Plymouth Dock in the County of Devon the Eleventh day of September in the Thirty Second year of the Reign of our Sovereign Lord George the Second (by the Grace of God) of Great Britain France and Ireland King Defender of the Faith and so forth and in the year of Our Lord One thousand Seven Hundred and Fifty eight Between the severall Commissioners whose hands and Seals are hereunto set appointed among others by his Majesty's Letters Patent under the Great Seal of Great Britain pursuant to an Act of Parliament

made and passed the last Sessions of Parliament intituled an Act for vesting certain Messuages Lands Tenements and Hereditaments for the better securing his Majesty's Docks Ships and Stores at Portsmouth Chatham and Plymouth and for the better fortifying the Town of Portsmouth and Citidel of Plymouth in Trustees for certain uses and for other purposes therein mentioned of the one part and Richard Doidge John Harris Robert Lake Thomas Lear Waltham Savery Evans Cove John Charles Hayne William Kitson Rawlin Mallock William Neyle Nicholas Brooking John Wolston Arthur Tremayne Arthur Kelley Arthur Champernowne John Hawking John Fowell William Strode and Charles Hale Esquires good and lawfull men Substantial Gentlemen and Freeholders of the said County of Devon Impannelled and returned before the said Commissioners by Peter Comyns Esquire High Sherrieff of the said County of Devon pursuant to a precept from Five of the said Commissioners to the said Sheriff directed duly Sworn and Charged to inquire into and present the true and real values of the Messuages Lands Tenements and Hereditaments in the said Act comprized and mentioned to be situate within the said County of Devon and of every part and parcell thereof at the time they were first made Use of for the purposes in the Act mentioned And who respectively are the Owners and propretors thereof and their respective Estates and Interests therein and all Controversies Debates and Questions touching or concerning the same or any part thereof of WHOM the underwritten being twelve of the said Jurors say and present upon their Oath that the True Value of all the said Messuages Lands Tenements and Hereditaments and of every part and parcell thereof and who respectively are the Owners and propretors thereof and their respective Estates and Interests therein are mentioned expressed and Sett down in the Schedule hereunto annexed Signed by the said Jurors IN TESTIMONY whereof to one part of this Inquisition remaining with the said Jury the said Commissioners (partys hereunto) have hereunto sett their Hands and Seals and to the other part thereof returned with the said Commission the said Jurors have hereunto Interchangeably putt their Hands and Seals the Day and year above written.

*(Here follow the signatures of twelve Jurors)*

A SCHEDULE of the true and reall Value of the Messuages Lands Tenements and Hereditaments at the time they were



first made use of for the purposes in the Act mentioned and every Part and Parcell thereof and who respectively are the Owners and proprietors thereof and their respective Estates and Interests therein referred to by the Indenture annexed.

WHEREAS in pursuance of an Act of Parliament made in the last Sessions Intituled an Act for vesting certain Messuages Lands Tenements and Hereditaments for the better securing his Majesties Docks Ships and Stores at Portsmouth Chatham and Plymouth and for the better fortifying the Town of Portsmouth and Citadel of Plymouth in Trustees for certain Uses and for other purposes therein mentioned And by Virtue of a Commission under the Great Seal of Great Britain issued in pursuance of the said Act bearing Date at Westminster the Twenty seventh day of July last past directed to us and others WEE Sir Richard Warwick Bampfylde Baronet Sir William Courtenay Baronet Sir John Molesworth Baronet John Rolle Walter John Tuckfield James Buller John Buller Henry Reginald Courtenay George Treby Charles Cocks Browse Trist Frederick Rogers William Basturd John Ommanney Charles Taylor Esquires and William Davy Esquire Serjeant at Law Being Sixteen of the Commissioners thereby named and authorised having taken upon Us the Execution of the said Commission as to such part of the Messuages Lands Tenements and Hereditaments in the said Act mentioned as are situate in the County of Devon did on the Eleventh Day of September in the two and thirtieth year of the Reign of our Lord George the Second meet at the House of Timothy Bayley known by the name or Sign of the Kings Arms in Plymouth Dock and proof was duly made before us on Oath and otherwise That Notice in Writing was fixed up at the Dock Gate of his Majesty's Yard and at the Town Hall of the Borough of Plymouth and likewise published in the London Gazette thirty Days and more before this meeting and as well on the Testimony of Witnesses Inspection and Examination of Deeds Writings and Records as by and upon the Inquest of Richard Doidge, John Harris, Robert Lake, Thomas Lear, Waltham Savery, Evans Cove, John Wise, Charles Hayne, William Kitson, Rawlyn Mallock, William Neyle, Nicholas Brooking, John Wolston, Arthur Tremayne, Arthur Kelley, Arthur Champernowne, John Hawkins, John Fowell, William Stroude and Charles Hale Esquires good and lawfull Men Substantial Gentlemen and Freeholders Impannelled Summoned and re-

turned by Peter Comyns Esquire Sheriff of the said County of Devon to take the Inquest Twelve of whom upon their Oaths duly administred upon the Holy Evangelists did present and say that Sir John St. Aubyn Baronet is seized in his Demesne as of Freehold for the Term of his natural Life Remainder to John St. Aubyn son of the said Sir John St. Aubyn and all and every other the sons of the said Sir John St. Aubyn in Tail Male Remainder to John Molesworth Esquire for his life Remainder to his first and other Sons in Tail Male Remainder to William Molesworth Esquire for his Life Remainder to his first and other Sons in Tail Male Remainder to the Right Heirs of Sir William Morice deceased of and in the severall parcells of Land hereinafter more particularly described and containing together One hundred Eighteen Acres three Rood and Eleven Rod and that the true and real Value of the said several pieces or parcells of Land at the Time they were first made use of for the purpose in the said Act mentioned was the Sum of Thirteen thousand One hundred Twenty six pounds Ten shillings of lawfull Money of Great Britain Now WEE the said Commissioners do on mature Consideration order direct adjudge decree and determine that the said Sir John St. Aubyn is Seized in his Demesne as of Freehold during the Term of his naturall Life Remainder to John St. Aubyn son of the said Sir John St. Aubyn and all and every other the sons of the said Sir John St. Aubyn in Tail Male Remainder to John Molesworth Esquire for his Life Remainder to his first and other Sons in Tail Male Remainder to William Molesworth Esquire for his Life Remainder to his first and other Sons in Tail Male Remainder to the Right Heirs of Sir William Morice deceased of and in a piece of Land called Little Cliff Field (Description of property follows) All which said pieces or parcells of Land contain together One hundred and eighteen Acres three Rood and eleven Rodd and that the true and reall Value of the said several pieces of Land and premises at the time they were first made use of for the purposes in the Act mentioned was the Sum of Thirteen thousand One hundred Twenty six pounds and Ten shillings of lawfull Money of Great Britain And that the said Sir John Aubyn and the persons in Remainder are intituled to the said Sum of Thirteen thousand one hundred Twenty six pounds and Ten shillings to be laid out in the purchase of other Freehold Messuages Lands Tenements and Hereditaments to be settled to the same Uses.

2. PRITCHARD Esquire. AND the Jurors aforesaid upon their

Oath aforesaid did further present and say that John Pritchard Esquire is possessed

*(Here follow statements of property & tenure & value)*

Now wee the said Commissioners do adjudge decree & determine that the said John Pritchard is possessed etc. etc.

And that the true and reall Value of the said several pieces of Land and premises last mentioned at the time they were first made use of for the purposes aforesaid was the Sum of etc.

*(Following finding of Jury)*

AND WEE do further adjudge decree and determine that etc. etc.

(Here follows apportionment of purchase money and next follow a number of similar findings etc.)

*(Here follow the signatures of twelve Commissioners)*

WHEREAS in Pursuance of an Act of Parliament made in the last Sessions Intituled An Act for Vesting certain Messuages Lands Tenements and Hereditaments for the better securing his Majestys Docks Ships and Stores at Portsmouth Chatham and Plymouth and for the better Fortifying the Town of Portsmouth and Citadel of Plymouth in Trustees for certain Uses and for other purposes therein mentioned and by Virtue of a Commission under the Great Seal of Great Britain Issued in Pursuance of the said Act bearing Date at Westminster the Twenty seventh day of July last past Directed to us and others WE Henry Gould Charles Whitworth Charles Petley Thomas Chiffinch Joseph Brooke Thomas Cooper Thomas Fletcher James Best Jacob Pickering Samuel Eyre and John Russell Esquires being Eleven of the Commissioners thereby named and Authorised having taken upon us the Execution of the said Commission as to such part of the Messuages Lands Tenements and Hereditaments in the said Act mentioned as are scituate in the County of Kent Did on the First day of November in the Thirty second Year of the Reign of our Sovereign Lord George the Second meet at the Guildhall of the City of Rochester scituate in Rochester in the County of Kent and Proof was duly made before us on Oath and otherwise that Notice in writing was fixed up at the Dock Gate of his Majesty's Yard at Chatham and at the Town Hall of the City of Rochester and likewise published in the London Gazette Thirty days and more before this Meeting and as well on the Testimony of Witnesses Inspection and Examination of

Deeds Writings and Records as by and upon the Inquest etc. [Here follow the names of Jurors] who upon their Oaths duly Administered upon the Holy Evangelist Did present and say &c. Now WEE the said Commissioners Do Adjudge Decree and Determine etc. etc. [Here follow findings etc. of Commissioners in accordance with the findings of the Jury.]

AND WE the said Commissioners in further Execution of the said Commission to us Directed do hereby Certify That we have in pursuance of the said Act of Parliament upon the Complaint of Thomas Feild the Tenant of Lands adjoining to the said Fortifications of Damages done to his said Lands heard and Enquired as well by the Oaths of Witnesses as the Inquest of the Jurors Sworn as aforesaid into the Damages so Done and do Estimate the Damage sustained by the said Thomas Feild to his Lands aforesaid at the Sum of Five Pounds of lawfull Money of Great Britain

*[Here follow similar findings as to the damage sustained by adjoining Owners]*

All which damages were sustained by means of making and Erecting the said Fortifications.

*(Here follow the signatures of twelve Commissioners)*

[Crown Office (Chancery) Commissions, Inquisitions, and Decrees relating to the purchase of land &c. for Fortifications No. 4]

GEORGE THE SECOND BY THE GRACE OF GOD of Great Britain France and Ireland King Defender of the Faith and so forth To

*(Here follow the names of Commissioners)*

Greeting WHEREAS in and by One Act of Parliament lately Passed Entituled AN ACT for taking down and removing the Magazine for Gunpowder and all Buildings thereto belonging Situate near Greenwich in the County of Kent and Erecting instead thereof a New Magazine for Gunpowder at Purfleet near the River Thames in the County of Essex and Applying a Sum of Money Granted in this Session of Parliament towards those Purposes and for Obviating Difficulties arisen upon An Act made in the last Session of Parliament for making Compensation for Lands and Hereditaments Purchased for his Majestys Service at Portsmouth Chatham and Plymouth It was Enacted that it should and might be Lawfull to and for Us by One or more Commission or Commissions by Letters Patent under the Great

Seal of Great Britain to Authorize and Appoint any Number of Persons to be Commissioners for Surveying and Setting out all such Messuages Mills Lands and Tenements and Hereditaments as it will be necessary to Purchase in Order to Build such intended Magazine for Gunpowder and other Buildings at Purfleet aforesaid and for executing the other purposes of the said Act in manner thereafter mentioned and that it should and might be Lawfull for the said Commissioners so to be appointed or any Five or more of them or such Persons as they or any Five or more of them shall appoint to Enter upon make Surveys of and set out and Describe by Lines Stakes or other Marks such Messuages Mills Lands Tenements and Hereditaments at Purfleet aforesaid as they the said Commissioners so to be Appointed or any Five or more of them shall think Proper to be purchased in Order for the Erecting and Building a Magazine for Gunpowder and the Guard House Barracks and other Convenient Buildings there as in and by the said Recited Act of Parliament amongst other things therein contained Relation being thereunto had may more fully and at large appear NOW KNOW YE that We Reposing Especial Trust and Confidence in Your Great Abilities Care Fidelity and Circumspection HAVE Nominated Constituted and Appointed and DO by these Presents Nominate Constitute and Appoint You

*(Here follow names of Commissioners)*

or any Five or more of You to be Commissioners for Surveying and Setting out all such Messuages Mills Lands Tenements and Hereditaments as will be necessary to Purchase in Order to Build according to the Directions of the said Act a Magazine for Gunpowder and other Buildings at Purfleet near the River Thames in the County of Essex and for Executing all and every other the Purposes of the said Act as far the same doth relate to the Erecting a New Magazine for Gunpowder at the Place aforesaid AND We do hereby Impower and Authorise You Our said Commissioners or any Five or more of You upon the Complaint of any Owner or Owners Occupyer or Occupyers of any the Messuages Lands and Hereditaments for this Purpose Described and mentioned in the said Act and adjoining to any part of the Lands and Hereditaments by that Act Vested in the Trustees therein mentioned that He She or they have Received any Damage by bringing Loading or Carrying any Materials necessary to Erect or Compleat any the Works therein mentioned or by any other

means whatsoever to Examine into and hear every such Complaint and if the same shall be made out to your Satisfaction then to make such Recompence for such Damages to the Party or Partys Injured out of the Moneys by the said Act Granted as to you Our said Commissioners or any Five or more of You shall from time to time seem Just and Reasonable AND WE do also by these Presents Authorize Impower and Direct You Our said Commissioners or any Five or more of You to do Perform and Execute all and every the Matters and things whatsoever which by the said Act such Commissioners are Authorized and Required to do Perform and Execute HEREBY Willing and Requiring You or any Five or more of You as aforesaid from time to time to Proceed and Act according to the Rules and Directions of the said Act of Parliament and Dilligently to Intend the Execution thereof in all things as becometh AND these Presents or the Inrollment or Exemplification thereof shall be to You and every of You a sufficient Warrant and Discharge in that behalf IN WITNESS whereof We have caused these Our Letters to be made Patent WITNESS Ourselves at Westminster the Seventeenth Day of September in the Thirty Fourth Year of Our Reign

YORKE & YORKE

BY WRIT of PRIVY SEAL

Filed 23 Feby 1761

[Endorsement of execution by six Commissioners]

AT A MEETING of the Commissioners appointed by his Majesty's Commission under the Great Seal of Great Britain bearing date at Westminster the Seventeenth Day of September in the thirty fourth Year of his Reign for carrying into execution AN ACT passed in the last Session of Parliament INTITULED An Act for taking down and removing the Magazine for Gunpowder and all Buildings thereto belonging situate near Greenwich in the County of Kent and erecting instead thereof a New Magazine for Gunpowder at Purfleet near the River Thames in the County of Essex and applying a Sum of Mony granted in this Session of Parliament towards those Purposes and for Obviating Difficulties arisen upon an Act made in the last Session of Parliament for making Compensation for Lands and Hereditaments purchased for his Majesty's Service at Portsmouth Chatham and Plymouth on Thursday the twenty third day of October One thousand seven hundred and sixty at the Publick House at Purfleet called the Crown,

## PRESENT

*(Here follow names of Commissioners present)*

The Commission having been read the said Commissioners being more than five in number now here Entred upon made Surveys of and set out and described and caused to be set out and described by Lines Stakes and other Marks the Messuages Mills Lands Tenements and Hereditaments at Purfleet in the County of Essex herein after mentioned which they the said Commissioners think are proper to be purchased in order for the erecting and building a Magazine for Gunpowder and the Guardhouse Barracks and other convenient Buildings there.

And it is hereby agreed by all the said Commissioners now present that the Messuages Mills Lands Tenements and Hereditaments by them set out and described and caused and directed to be set out and described in manner before mentioned are proper and are hereby Ordered to be purchased for the purposes mentioned in an Act passed the last Session of Parliament INTITLED AN ACT for taking down and removing the Magazine for Gunpowder and all Buildings thereto belonging situate near Greenwich in the County of Kent and erecting instead thereof a new Magazine for Gunpowder at Purfleet near the River Thames in the County of Essex and applying a Sum of Mony granted in this Session of Parliament towards those purposes and for obviating Difficulties arisen upon an Act made in the last Session of Parliament for making Compensation for Lands and Hereditaments purchased for his Majesty's Service at Portsmouth Chatham and Plymouth Which said Messuages Mills Lands Tenements and Hereditaments so ordered to be purchased with their several Abuttals and Boundaries are as herein after mentioned that is to say

*(Here follows description of messuages)*

All which said Messuages Mills Lands and Premisses are situate lying and being in the Parishes of West Thurroek Avely and Wennington some or one of them in the County of Essex and are more fully delineated and described in the Plan hereto annexed

And the said Commissioners do adjourn this Meeting to Thursday the Eleventh day of December next at ten o'clock in the Forenoon to the Angel Inn at Ilford in the County aforesaid.

## ACQUISITION OF LAND

AT A MEETING of the said Commissioners at the Angel Inn at Ilford in the County of Essex the eleventh of December One thousand seven hundred and sixty.

Present

*(Here follow names of Commissioners present)*

Some of the Owners and persons interested in the Messuages Mills Lands Tenements and Hereditaments surveyed and set out as proper to be purchased for erecting a Magazine for Gunpowder and a Guardhouse Barracks and other convenient Buildings at Purfleet appear and offer to treat But make so high Demands for their respective Interest in the same that the said Commissioners cannot agree for the Purchase thereof Other of the said Owners and persons interested appear but are unprepared or unable to treat with the said Commissioners and others of the said Owners and persons interested do not appear to treat and agree with them And thereupon the said Commissioners do order and direct That an Offer be made to the Several and respective persons Bodys Politick and Corporate Ecclesiastical or Civil herein after mentioned for their several and respective Interest in the said Messuages Mills Lands Tenements and Hereditaments so surveyed and set out the several and respective Sum and Sums of Money herein after mentioned that is to say.

*(Here follow particulars of Claimants and sums offered)*

And the said Commissioners do further order and direct that a Jury be impanelled summoned and returned by the Sheriff of the County of Essex on Monday the nineteenth Day of January next at Ten o'clock in the Forenoon at this place before the Commissioners who shall then meet on their Oath to inquire into and ascertain the true and real value of the Messuage Mills Lands Tenements and Hereditaments of such person or persons Bodies Politick or Corporate Ecclesiastical or civil as shall then and there refuse or neglect to treat and agree with the said Commissioners or shall refuse to accept what the said Commissioners think a reasonable Recompence or Satisfaction for their respective Interest therein And of such person or persons as through any Disability by Nonage Coverture or special Limitations in any Settlement or Settlements or by reason of any controversy in Law or Equity or any other Impediment cannot treat and agree with the said Commissioners And that the said Jury do on



Friday the Sixteenth Day of the said Month of January View the said Messuages Mills Lands Tenements and Hereditaments so surveyed and set out and intended to be purchased in order for their better ascertaining the true and real Value thereof

And the said Commissioners do hereby direct a Precept under their Hands and Seals to the Sheriff of the County of Essex to impanel summon and return such Jury in the Words and Figures or to the effect following (that is to say)

*(Here follows the form of the Precept)*

And the said Commissioners do further Order and direct that Mr. Thomas Stanyford do give Notice and make the said offers respectively to the said respective Owners of the said Messuages Mills Lands Tenements and Hereditaments so intended to be purchased in writing Thirty Days before the said nineteenth Day of the said Month of January and that a Jury will be impanelled summoned and returned and have a View of the said Premises before that time

And the said Commissioners do adjourn this Meeting to Monday the nineteenth Day of January next at this place at ten o'clock in the Forenoon.

AT A MEETING of the said Commissioners  
at the Angel Inn at Ilford on Monday the  
nineteenth Day of January One thousand seven  
hundred and Sixty one

Present

*(Here follows names of Commissioners present)*

Proclamation is made for all persons owners of or interested in the Messuages Mills Lands Tenements or Hereditaments described and set out by Lines Stakes or other Marks as proper to be purchased for the erecting a Magazine for Gunpowder and a Guard-house Barracks and other convenient Buildings at Purfleet in the County of Essex do appear and make out their Title and Claim and to agree with the said Commissioners now met for their Estate and Interest therein.

And thereupon the said Commissioners agreed with John Pelly Esquire for the compleat and absolute Purchase of his Estate and Interest in the Words and Figures or to the Effect following (that is to say)

BE IT REMEMBERED that on the nineteenth Day of January in

the first Year of the Reign of our Sovereign Lord George the Third by the Grace of God of Great Britain France and Ireland King Defender of the Faith and so forth and in the Year of Our Lord One thousand seven hundred and sixty one between The Reverend Doctor William Parker Sir James Creed Kn<sup>t</sup> John Hopkins John Peter Desmaretz Henry More Matthew Dove Joseph Bird and Matthew Bateman Esquires being Eight of the Commissioners nominated and appointed by his late Majesty's Commission under the Great Seal of Great Britain bearing date at Westminster the Seventeenth Day of September in the thirty fourth Year of his said late Majesty's Reign for carrying into Execution An Act passed the last Session of Parliament amongst other things for taking down and removing the Magazine for Gunpowder at Greenwich and erecting instead thereof A new Magazine for Gunpowder at Purfleet in the County of Essex of the one part and John Pelly of Upton in the County of Middlesex Esquire of the other part It IS WITNESSED that the said Commissioners Have Treated Consented and Agreed And by these Presents Do treat Consent and Agree That the said John Pelly shall be paid the Sum of One hundred and fifty Pounds of lawful Money of Great Britain for the compleat and absolute Purchase of his Interest in and the Freehold and Inheritance of all that piece or parcel of Marsh Land

*(Here follows description of the property)*

as proper to be purchased in order for the erecting and building a Magazine for Gunpowder and the Guardhouse Barracks and other convenient Buildings there pursuant to the said Act of Parliament And the said John Pelly doth hereby consent and agree to and with the said Commissioners that he the said John Pelly shall and will accept receive and take the said Sum of One hundred and fifty Pounds in full satisfaction for the compleat and absolute Purchase of the said Lands Tenements and Hereditaments hereinbefore mentioned And that after Payment of the said Sum of One hundred and fifty Pounds in manner as in the said Act is mentioned the said Lands Tenements and Hereditaments now vested in the Trustees named in the said Act shall be and remain to and for the use of his Majesty his Heirs and Successors free of and from all Charges and Incumbrances whatsoever made by the said John Pelly or any of his Ancestors In Witness whereof the said Commissioners and the said John Pelly have hereunto set their Hands.

And no other person being prepared to agree with the Commissioners for any other of the said Messuages Lands Tenements or Hereditaments the Sheriff is called upon for a return of his Warrant directed to him in the words and manner herein before mentioned And thereupon he returns the said Warrant with the Panel thereto annexed and thereby certified to the Commissioners in the said Warrant named That by virtue of that Precept to him directed he had caused the Places in question to be viewed by twenty two of the Jurors in the said panel thereto annexed named and that the Residue of the Execution of the said Warrant appears in the said Panel which is in the words and figures following that is to say

Essex to wit The Names of the Jurors  
summoned to Inquire upon their Oaths as by  
the annexed Precept is directed.

*(Here follow names of Jurors)*

And after the Owners and other persons interested in the said Messuages Mills Lands and Hereditaments marked out for the purpose aforesaid had been informed that if they or any of them would challenge any or either of the Jury impanelled and returned they should challenge them as they came to the Book before they were sworn.

*(Here follow names of Jurors)*

... appearing took the oath following

You swear that you will well and indifferently without favour or Affection Hatred or Malice enquire into ascertain and assess the true and real value of such Messuages Mills Lands Tenements and Hereditaments as shall be given to you in charge and are now set out and described by Lines Stakes or other Marks as proper to be purchased in order for the erecting and building a Magazine for Gunpowder and a Guard House Barracks and other convenient Buildings at Purfleet in this County pursuant to an Act passed the last Session of Parliament Intituled AN ACT for taking down and removing the Magazine for Gunpowder and all Buildings thereto belonging situate near Greenwich in the County of Kent and erecting instead thereof a New Magazine for Gunpowder at Purfleet near the River of Thames in the County of Essex and applying a Sum of Money granted in this Session of Parliament towards those Purposes and for obviating Difficulties arisen upon an Act made in the last Session of Par-

liament for making Compensation for Lands and Hereditaments purchased for his Majesty's Service at Portsmouth Chatham and Plymouth and who are the Owners and Proprietors thereof and of every part and parcel thereof and the true and real value of their each and every of their respective Rights Estates and Interest and a true Verdict give according to the best of your Judgment and Knowledge

So help you God

After the Jury were sworn Caleb Grantham Esq<sup>r</sup> by his Council appears and claims to be seized in his Demesne as of Fee of and in the Messuages Lands and Hereditaments herein after next mentioned And Sir Matthew Fetherstonhaugh Baronet by His Council appears and claims to be possessed of part of the said Messuages Lands and Hereditaments by virtue of a Lease to him granted for the Remainder of Sixty one years And Thomas Keene appears and claims part of the said Lands as Tenant to the said S<sup>r</sup> Matthew Fetherstonhaugh John Pettit appears by his Agent and claims to be possessed of other part of the said Messuages by virtue of a Lease thereof granted to Henry Woodin for the remainder of a Term of twenty one Years After hearing Council and an Agreement between the said Caleb Grantham and Sir Matthew Fetherstonhaugh being admitted by the Council on each Side that the said Jurors now sworn should in the consideration of their respective Interests ascertain the Rent that should be abated by the said Caleb Grantham to the said Sir Matthew Fetherstonhaugh in respect of such Messuages Lands and Hereditaments now purchased and after examining Witnesses as well on behalf of the said Caleb Grantham as of the said Sir Matthew Fetherstonhaugh The said Jurors upon mature consideration had upon their Oath do present and say

*(Here follow findings of Jury)*

And thereupon the said Commissioners do adjudge decree and determine that the true and real value of the said Messuages Lands Tenements Hereditaments and Premises last mentioned with the Appurtenances is the Sum of Two thousand two hundred Eighty six Pounds nineteen Shillings and Six Pence of lawful money of Great Britain And that etc. etc.

*(here follows the apportionment) |*

TUESDAY the twentieth Day of January One thousand seven

hundred and sixty one at a Meeting of the said Commissioners at the Angel Inn at Ilford.

PRESENT

*(Here follow names of Commissioners present)*

The like Proclamation made as herein before mentioned and the Jury being called over all appear and Sarah Hallett Widow appears and by her Councel claims to be seized in her Demesne as of Freehold for the Term of her Life of and in the Messuage or Tenement and Hereditaments herein after mentioned Remainder thereof to Mary Turner an Infant her Granddaughter and her Heirs for ever Subject to the annual reserved Rent of Ten shillings payable to Dame Mary Lake for her life and after her Decease to Sir James Winter Lake Baronet an Infant and subject to a Mortgage thereof, made to Rachael Dickens Widow and her Heirs for securing the Repayment of One hundred pounds and Interest after the rate of Four Pounds per Cent per Annum and the said respective claims not being controverted the Jurors aforesaid upon their Oath aforesaid Do present and say that Sarah Hallett Widow is seized in her Demesne as of Freehold for and during the Term of her natural life of and in

*(Here follows description of parcels)*

as proper to be purchased in Order for the erecting and building a Magazine for Gunpowder and the Guardhouse Barracks and other convenient Buildings there pursuant to the said Act of Parliament Remainder thereof to her Granddaughter Mary Turner and her heirs for ever Subject to a Rent of Ten Shillings a Year to Dame Mary Lake for her life Remainder to Sir James Winter Lake in Fee and to a Mortgage thereof made by Indentures of Lease and Release bearing Date respectively the twenty fourth and twenty fifth days of October which was in the Year of our Lord One thousand seven hundred and fifty four between the said Sarah Hallett and Spencer Turner and Sarah his wife of the one part and Rachael Dickens of the other part whereby the said Sarah Hallett and Spencer Turner and Sarah his wife grant and convey the said Messuage or Tenements and Premises last mentioned with the Appurtenances by the name and description of etc.

*(Description of parcels)*

that the true and real Value of the said Messuage Tenement or Dwelling house and Premises last mentioned with the Appur-

tenances is the Sum of Four hundred and sixteen Pounds ten Shillings of lawful Money of Great Britain And that the said Estate and Interest of the said Rachel Dickens of and in the said Messuage or Tenement and Premises last mentioned with the Appurtenances is of the true and real value of One hundred Pounds And the said Estate and Interest of the said Sarah Hallet and Mary Turner is of the true and real Value of Three hundred Pounds And that the said Dame Mary Lake and Sir James Winter Lake's interest therein is of the true and real Value of Sixteen Pounds ten shillings.

And the said Commissioners do Adjudge Decree and Determine that the true and real Value of the said Messuage Tenement or Dwelling house and Premises last mentioned with the Appurtenances is the sum of Four hundred and sixteen Pounds ten shillings of lawful money of Great Britain and that the said Rachael Dickens for her Estate and Interest thereon be paid the Sum of One hundred Pounds part of the said Sum of Four hundred and Sixteen Pounds ten shillings and that the Sum of Three hundred Pounds other part of the said Sum of Four hundred and sixteen Pounds ten shillings be paid to the Deputy of the King's Remembrancer at the Court of Exchequer at Westminster for the Estate and Interest of the said Sarah Hallet and Mary Turner in the same pursuant to the Directions of the said Act of Parliament And that the Sum of Sixteen Pounds ten shillings the Residue of the said Sum of Four hundred and sixteen Pounds ten shillings be paid to the said Deputy of the King's Remembrancer for the Interest of the said Dame Mary Lake and Sir James Winter Lake pursuant to the Directions of the said Act of Parliament.

*(Here follow similar proceedings and findings)*

AT A MEETING of the said Commissioners on Monday the Sixteenth day of February in the Year of our Lord One thousand seven hundred and Sixty one at the Crown and Anchor Tavern in the Strand in the County of Middlesex.

PRESENT :

*(Here follow names of Commissioners present)*

WEE whose names are hereunto subscribed met for the further Execution of the said Commission pursuant to the said Act of

Parliament DO HEREBY CERTIFY to the Clerk of the Crown in His Majesty's High Court of Chancery that the said Commissioners have pursuant to the Powers and Authorities to them given by the said Commission proceeded to carry the said Act into execution and have caused their Surveys Agreements Orders Judgments Decrees and Verdicts to be entered in a Book in the Words and Figures above mentioned.

*(Signatures follow)*

AN EXACT SURVEY of the LANDS necessary to be purchased by the CROWN pursuant to an ACT of PARLIAMENT for ERECTING a POWDER MAGAZINE and other Buildings at PURFLEET in the County of ESSEX.

*(Here follow particulars)*

## APPENDIX D

### EXTRACTS FROM THE REPORT BY BRUCE IN 1798 ON THE ARRANGEMENTS FOR THE DEFENCE OF THE KINGDOM AT THE TIME OF THE ARMADA

IN 1586 directions were given to the Lord Lieutenants requiring them to issue orders to the different Captains in their Lieutenancy to meet at appointed places on or before the 20th of March in order to make up their musters of men and of arms to Deputy Lieutenants, to mark out to the Captains the posts which they were to occupy, and to cover these posts by batteries, dig pits, and plant stakes, to stop the progress of the enemy if he landed : to assign stations for the horses and field pieces : to fix on places for the powder magazines : to appoint days for the horses to be trained and to name the places of rendezvous : taking care to have roads and fords repaired, and cross-bars ready, to stop the enemy after landing.

This general instruction was followed up in 1587 by an order for completing the musters of the forces in the different counties, and for having them fully accoutred and in readiness to march on the first notice ; requiring at the same time that returns should be made of the amount of the musters, both of men and arms, to Her Majesty in Council.

But that the Queen's orders, in so far as regarded the maritime counties, might be more fully explained and understood, instruc-

tions applicable to each county were sent on the 10th of February 1587 (that to the county of Devon may be taken as a specimen) requiring—that the number of Deputy Lieutenants should be completed—that, under the warrant of Her Majesty, orders should be issued for putting the men in array and in readiness at their different stations, that convenient places should be assigned to five General Captains (as they were termed) who were made answerable for the effective numbers of 500 each, and to two additional Captains for 250, making in the whole a band of regiment of 3,000 foot, to be reviewed and exercised, and in readiness to go on service on the sea coasts under the orders of the General Commander of the coast, to be afterwards named by Her Majesty; that the five Captains should likewise muster the bands of horsemen, to be divided into troops of 50, for each cornet, and appoint places of muster for the same; that the whole may be returned in general muster rolls as ready for service, and exercised at least 25 at a time to qualify them for duty; that a survey of the places where the enemy may land should be taken, and means provided more speedily to convey under proper leads the forces to resist him, and directions given to raise ramparts not only against his progress in the country; that a proper number of pioneers should be raised to act on this duty; that every justice of the peace, being of quorum, should furnish two horsemen, and every other justice one, that the towns within the county should provide the necessary store of ammunition at a reasonable price; that beacons should be erected on the sea coast and men placed near them to watch the motions of the enemy's ships; and that ports should be in readiness to carry information of his approach; that return should be made to the Queen of the due execution of these instructions; and that each band of 500 footmen should be formed into a regiment and attended by 700 horsemen, besides the horsemen furnished by the justices of the peace; the whole properly arrayed and in good order to withstand any attempt which the enemy may make to land or to advance.

Notwithstanding these precautions it appears that in some of the counties, though the lower and middling orders were well disposed and had made laudable exertions to fulfil Her Majesty's intention of putting the country in a state of defence, yet that several of the higher orders, under the pretext that the danger was not so immediate, had either refused to furnish the necessary horses and carriages, or postponed their services under the



pretext that they were necessary only after the invasion should actually take place.

These circumstances Lord Sussex, with an honest and loyal indignation, represents as unjustifiable, because the resistance was to be made against an enemy 'whose malice and preparations were great'; adding what in every crisis must appear an evidence of a decided loyalty that to discharge his duty with effect he must have, without favour or partiality to any man, the selection of such officers to serve under him as can execute the great duty of defending his country with credit to themselves and to their Commander.

In the counties such as Lincoln where an attack was not so much apprehended as on the coasts more immediately skirting the seas by which the embarkation from Spain must approach, the instruction (in December 1587) directed the Deputy Lieutenants to require the inhabitants in the three divisions of Lindsey, Kesteven, and Holland, to put the coast in a posture of defence lest the Duke of Parma should land his army when accounts should reach him of the arrival of the Armada, expected on the coast of Cornwall and Devon.

The anxiety felt by the Ministers of Elizabeth from the daily accounts which they received of the preparations of the enemy induced the Queen's Council on the 2nd April 1588 to address an Order, in the form of a letter, to the Lord Lieutenants of the different counties requiring them to obtain returns from their Deputies of the state of preparations in the different districts, and to forward the same for the Queen's information that she might have full knowledge of the strength in each county, and be prepared to oppose the attack of the enemy.

Of the same date, and strongly marking the anxiety of the Council at this crisis, were the instructions sent to the Lord Lieutenants of the different counties requiring them to send in lists of the names of the officers of every rank and, in case of proper persons not being found in any one county, to fill these stations, the vacancy or the defect was to be supplied by persons recommended to the Queen as able to discharge this trust.

Not relying, however, on these general instructions, the Queen, on the 6th of April 1588, appointed Sir John Norris, with full powers to direct the arrangements for the internal defence of the maritime counties of Kent, Sussex, Hampshire, Dorset, Essex, Norfolk and Suffolk; and addressed a letter to the Lieutenants or their deputies of these counties, requiring them

to give every necessary information and aid to this General, and to follow all his orders in putting the coast in a state of defence either to obstruct the landing or progress of the enemy. Sir John Norris was for this end to fix on stations to which the guards of the coast might if overpowered retreat and form an army to harass the enemy's march, or resist his entrance into the interior of the country.

These instructions were accompanied with topographical directions given on 30th of April 1588. Those for the county of Norfolk are so precise and correct that they may be selected as a specimen applicable (allowing for differences in local situation) to the other counties during the existing danger.

These directions set out with describing the points on the east coast where the attack might be expected, viz. Waburne, Hoope, Cleyhaven, Waaham, Winterton and Yarmouth, at each of which for the protection of the shipping as well as of the coasts where the depth of water would admit the enemy's vessels, ramparts were ordered to be erected, defended by trenches reaching from one salt marsh to another. The causeways were to be broken up, parapets to be built, the old Hythe to be entrenched and defences raised at the distance of a mile from Lynn where the channel is narrowest, and defended by a proportion of cannon. On the approach of the enemy the bridges on the Ouse were to be broken down, and the banks cut, to impede his progress. Bodies of horse and foot were to patrol and obstruct his march, galling him at the same time with the ordnance from Winterton and Bromhall.

For the purpose of carrying these measures into execution the shire was to be divided into districts, and the forces placed in such stations as might enable them most easily to concentrate at Yarmouth. The detachments of foot were to consist of 300, one half trained and the other irregulars, accompanied by 73 pioneers and 20 carriages; each carriage was to be conducted by two men, and the whole to be in readiness for forwarding the necessary works.

The directions, further, minutely specify the commanders and the proportion of force under them who were to act at successive times as reliefs to each other, from the 13th of May to the 9th of July inclusive; point out the mode of giving the alarm on the approach of the enemy by beacons on which fires were to be lighted; described the lines in which the trained men under the Deputy Lieutenants were to advance against him, and enjoin

the multitude to avoid assembling or creating confusion or disorder.

In the event, however, of the enemy reaching Waburn such strength as the county can assemble was to be brought up against him, but if unable to retard his progress the foot and horse were to retire for the protection of the important town of Norwich, take station on the height of Montefurroy which commands the city, and defend the town till an army can be marched from the neighbouring counties to the relief of the place. In the event, however, of the enemy debarking between Yarmouth and Bromhall, the forces were to take post at Flegge, defend the bridges, or, if untenable, to break them down; should he take the road by Thetford towards London the forces of Norfolk were to hang on his rear, harass his march and prevent his foraging parties laying waste the country. The magazine was to be at Norwich, and on the approach of the enemy the corn was to be burned down, the cattle drove inland, and bridges and roads broken up to impede his march. In case the attack be made on the side of Lynn, the Governor was to take care that no horses or carriages be left behind to be seized by the enemy.

For all these purposes special commissions were given in the different districts to particular officers to superintend each branch of these diversified services, and strict orders issued for keeping regular guards at the different bridges to stop all suspected persons, particularly in the night time, and to bring them before the justices for examination.

These justices were to be assisted by constables, and post-horses were to be kept in constant readiness to convey intimation of the appearance or approach of the enemy's fleet to the coast.

Another, and perhaps the most important station to be guarded, was the coasts bordering upon the mouths of the Thames as will appear from the accompanying chart. This subject seems early to have attracted the Queen's notice, as the charges for the chains and forts guarding the Medway were made up in the month of January 1588, amounting to 1,470*l*. The defences appear to have had two objects: the protection of the shipping in the river and security against the enemy's approach to the capital.

For these purposes a great chain was fixed to cross the river at the opposite point from Upnore Castle, with a wood-work to cover two large wheels for moving it; and lighters were provided with cables and anchors for buoying it up. St. Mary's

and the other creeks were to be protected by batteries, and Upnore Castle repaired by platform, dykes, &c.

The Queen's exactness in the article of charges appears to have been more particularly explained by an Order of Council dated the 25th August 1588, in which she requires from the different Lord Lieutenants an account of the monies that had been levied in their counties for her service, and the purposes to which the sums had been applied, specifying that exact payments must be made to the soldiery, and prohibiting, under pain of her displeasure, any money to be accepted in lieu of services.

\* \* \* \* \*

A barrier was to be made at Warham Bridge to obstruct the enemy in case the retreat of the Queen's forces should be necessary, in which case the roads were to be cut and the water let in.

\* \* \* \* \*

These instructions were followed up in June 1589 with orders to the Lord Lieutenants to direct their Deputies to publish the Lord Lieutenant's Commission in the county, to muster and exercise the men within their districts, and to return lists of all the men able to serve ; to appoint to every 50 horse a captain and cornet ; to survey the coasts and make the necessary fortifications for defending the places where the enemy might land ; to survey the country inland that in case of his advancing forward stations might be fortified where his progress may be checked ; to assign to certain bodies of the trained men the duty of repairing to these places ; to appoint pioneers to every general band ; to provide the necessary carriages ; to have at least 300 or 400 horsemen trained to firearms ; to require every justice of the Quorum to furnish two petronels on horseback, and every other justice one, who should attend the Lord Lieutenant to see that all suspected persons be disarmed ; to administer the oaths of supreme act to the Captains and trained soldiers ; to see all farmers enrolled in places adjacent to where the trained hands meet ; and to take care that the persons having authority shall have the proportion of powder in store at the Queen's price.

\* \* \* \* \*

By the 33 Geo. III, cap. 8, provision has been made for the families of militia men ; by the 34 of Geo. III, cap. 16, Lord Lieutenants are empowered to accept offers to raise

volunteer companies, and also additional volunteers to regiments ; and by cap. 31 corps of volunteers are authorised to be raised for the defence of counties, towns or coasts, or for the general defence of the kingdom during the present war and, by cap. 47 farther relief is provided for the families of militia men. This was farther explained by the 35 of the King, cap. 81 ; and still farther, by the 36th, cap. 114. By the 37 of the King, cap. 3, the militia were farther augmented, and by cap. 4, a provisional cavalry for the defence of the kingdom was embodied. By cap. 22, His Majesty was empowered to embody the augmented militia in case of necessity for the defence of these kingdoms, and by cap. 23 the provisional cavalry was to be embodied ; and farther augmented, by cap. 139. By the 38 of the King, cap. 17, a proportion of the men in the augmented militia was allowed to enlist in His Majesty's other forces, and to serve only until six months after the conclusion of a general peace ; by cap. 18, His Majesty was authorised to order out a certain proportion of the supplementary militia and to incorporate them with the several companies of militia ; and this was farther explained by cap. 19, and still farther by the Act, more effectually to provide for the defence and security of the realm during the present war, and for indemnifying persons who may suffer in their property by such measures as may be necessary for that purpose.

\* \* \* \* \*

4. That the Crown by its Lord Lieutenant exercised during the reign of Queen Elizabeth the power of calling on counties, town bodies corporate, beneficed ecclesiastics and others, to furnish, in cases of menaced invasion, quotas of arms, ammunition, military stores, pioneers, artificers, &c., necessary for the army ; and armed vessels, mariners and a proportion of victuals for them to assist in repelling the common enemy ; making the Lord Lieutenant, his Deputies and the Justices judges of such services. That the Crown, by the like power delegated to the Lord Lieutenants, could call on all land holders, farmers, &c., to furnish carriages, posts to convey information of the approach, or actual landing of the enemy, and by himself, or by his Deputies to issue orders for driving away the cattle and horses from the coast inland ; for burning and destroying the corn, or whatever might be of use to the enemy ; for breaking down bridges, cutting up roads, and, in general, for doing everything which might prevent, or might check if he actually landed, his progress

in conquest ; measures which the recited Acts of the Legislature have in part adopted, and in which the general loyalty of the subject in the present crisis has happily co-operated.

\* \* \* \* \*

## APPENDIX No. II

THE POINTS of the Directions given to the Lord Lieutenants of the Marityme Counties in the beginning of March last 1586

1. The Lieutenants to cause several captaynes to assemble their bandes, at a place appointed, by the 20th of March, and to view them, and to supply dead and lame mens' roomes.

2. To muster their bandes, in places neare the sea coasts, where they are appointed to repair, and to punish or reforme defects.

3. The Lieutenants, or their deputyes, to lead the captaynes to the places of descent, to acquaynt them with the ground.

4. To devise how to cover the soldiers from th' ennemy by nature of the place, sconces, trenches, parapets.

5. To empeach the landing in places of danndger, by making pits and planting stakes.

6. To appoint a place of keeping, for certain field peeces and horses and carriages to draw them.

7. To appoint a place for the store of powder and match.

8. To cause the horse to be viewed and trayned, by a day to be appoynted by the Lieutenant.

9. To appoint places of rendezvous.

10. To appoint gardes to repaire to passages and fords, and to take order for erecting of turnpykes, uppon landing of th' ennemye.

April 10th, 1789.

Exd. J. Bruce.

\* \* \* \* \*

## APPENDIX No. IV

Instructions for the putting in Strengthe of all Her Ma'ties subjects within the countie of Devon, for Defence of the same countrie, uppon anye invasion to be made uppon the same.

February 10th, 1587.

\* \* \* \* \*

Itm. The said five persons, or in absense of anie one, the rest shall newlie consider of the places, where an enemy maie

descend to lande to the offence of the countrey ; and consider that impeachment may be devised to withstand their landinge ; and thereof to make provision, how the same defences maie be put in order and executed. And to consider, alsoe, howe convenient forces maie be speedilie brought to their landing places, to withstand the enemy, and to expell him. For which purpose, according to the orders, the last yere, directed by the Lieutenant, it would be considered, howe such numbers of pioners maie be in redines, under conductors and leaders, both with weapons and toles, fit for work by ditching, trenching, or levienage of rampiers, to withstand to the accesse or landings of the enemy, or otherwise, in places of straights, after their landings, to impeach their coming forward.

Itm. Divers other partes of the said orders shall be presently vewed and prepared in readiness, tending to the impeaching of the landings of the enemy, which being well forseene, and diligently followed then tyme should require, maie serve more to purpose to be done, with few nombres of souldiers trained, and strong pioners, to be speedilie conducted to the place of service, under wise and valiant captains, than after the opportunitie of the tyme omitted, tenne times so manie shall be hable to remedie the danger.

\* \* \* \* \*

#### APPENDIX No. V

LETTER from the EARLE OF SUSSEX to the LORDS OF  
COUNSELL, 30th November 1587

It maie please yo Hono at my retorne, into the countrey, I came by Basinge and there having conference with my Lords Marques, we agreed to viewe the wholl shire o selves ; and he having taken the one parte, and I the other, we are now in accomplishinge the same ; and for my own parte, I wolde not for anything, but that I should have done yt, for so farre as I have yett passed, I have found neither armour, weapon, nor shott, nor men, accordinge to my expectacon ; but it falleth owt, as I have often saied, friendshippe, favour, or somewhat else, doth make, that the best able be most favored the welthiest most easilye charged, and the willinge most pressed and burdened, but at the finishing of this my travelsome journey, I hope to write unto yo Hono. of some amendment thereof, as by certificate of th'increase, shall then more plainlie appeare.

Yo Hono wolde thinke these speeches to be strange, if you shold heare them, the meaner and poorer sort, to saie, he that wold not sell horse and carte to defend his prince, cuntrye, familie, and children, it were pittie he had any thinge ; and the higher and next sorte to saie, we are much chardged, manie waies, and when the Enemy comes we will provide for him, but he will not come yett. I am forced to use these kind of perswasions to the poorer and willinge, who yealdeth more than their abilitie ; I promise it shall remayne, but as a thing done of their dewtiful good wills, for this present, considering the malice and preparacon of the enemies, and not to remain, as a continual chardge upon them, and to the better and other sorte, I perswade as they have most to lose, so ought they, besides their dewtie towards their Prince and love to their cuntrye, so to provide and have in readynes, such store of all thyngs as shall best defende the same, whereby they maie be better thought of, amongst the best, and also the more beloved of neighbours for their good example ; wherein if I shall find them unwilling, as they thereby shall geve me greate and just cawse of mistrust in them so shall they be assured, that in all taxacons, cessments or other imposicons, and taking uppe for services, I will burdem them to the uttermost, which I hope will so take place with them, as there shall be some amendment.

My goode Lorde, I am most hartelye and earnestlye, not onelie to require, but also for the better defence of the realme, as dewty bindest me to chardge your Hono to be a meane, for the present, sending downe of the gonners, without whom I wish the ordinance to the tower again, the platformes to be repaired and that of the round tower to be made new for that it is so owld and rotten, as on the daie of the Q. Ma'ties coronation, I durst not shoote of one peece, which place is the onelie chiefest, for the defence and safe garde of the haven. The corne powder, for the small shott, and all the other necessities, are presently to be sent awaie, if Hir Ma'tie to your Honors do expecte any enemies, but if you thinke all things doe stand secure and saife, you maie perhappes detract tyme, so longe as it maie be to late repented. Goode, my Lorde, beare with my plaine writinge, for what you knowe there, I here not, but I can not lerne here, but that it is most necessarie to be presentlie readie.

It pleased my Lorde Chancell and your Hono and the rest, that I shold confer with the justices of the circuite, towchinge the justices of the peace, and leaving a note of my opinion of



suche, as I thought most fitt, and specially, in this time, I nominated three to be newlie put in, viz., Mr. John Seymour, sonne to Sir Henry Seymour, Mr. William Uvedall, and Mr. John White, of Sowthwicke ; the last of them three is, as I am informed left owt, and yet all kinds of waies most fittest, and by me thought most meetest, for some parte of my own ease, being weries, having no helpe, but Mr. Francis Cotton. The man is, for his good discretion and government, upright dealing, good hospitalitie, and chargeable service, for his prince and countrie inferior to fewe or none, hereabowts, and seing, as I am put to service, I would be gladd to have some in credit, that I might best trust, of whom he is, besides his abilitie, one of the chiefest, and I thinke will best discharg the same.

The earthe works will, by the end of this moneths paie, be very neere finished ; and then must I know her Ma'ties pleasure what shall farthest be done with the men, and how they shall be employed. I thinke it very necessarie and most meet, that the stone wall, from the platforme to the Pointe Gate, be rampared with earth, which maie be done with those labourers and men, which shall be continued for the guarding of the towne, and so bothe to be but one chardge. And so, I must humblye comit your Honor to God.

From Portsmouth, this last of November 1587.

Your Honors Assured,  
to his power,  
SUSSEX.

April 10th, 1798.

Exd. J. Bruce.

\* \* \* \* \*

#### APPENDIX No. X

Directions left by mee, Sr. Thomas Leighton, Knt., for all Martiall Causes, in the Countie of Norfolk, with Sr. Edward Clere and Sr. William Heydon, Knights Deputie Lieutenants of the said Countie, and with Ralph Lane, Esquier, appointed by their Lordships to assist them in the Execution thereof and with Captaine Havers, Captain Helme, and Captn. Pepper.

The Last of April 1588

Firste, for as much as Waburne Hoope and Cley Howen, Waxham, Winterton, and Yarmouth are the places of greatest danger, within the said countye, by reason there are good roades

for shippinge, and also the sea, upon all those coasts, are shoare deep, so as the enemye may, with greate easse, land his forces, except good order bee taken to impeache hym ; I do thinke meete, so followethe :

The sconce at Waburne Hoope to bee enlarged, according to the platte delivered unto you, withe the trenche adjoyninge, alonge the Salt Marsh, till you meete with the mayne channell which comme from the Salthowse.

Also, that the Cawsey, leadinge from Salt howse to the Lodge in Sr. Willm. Heydon's warren, be cut, upon occasion.

A small sconce, to be made at Black Eye, to gard the entrie at Cley Haven.

The clyffes at Sheringham and Cromer to bee cutte sloping and the passage downe the water to be curved up, and parapet made upon the toppe.

The old Hythe to be intrenched, impeache the comynge up of the enemy there.

A skonce to be made at the Crotche, a myle distant from Lynne, where the channell is narrowest, at the charge of the inhabitants of the said towne, and to be furnished with ordinance and munition by them. And for that, the said towne of Lynn, is a place of great importance, for manie respectes yt is verie expediente, that some man, of good experience and sufficiencie, bee appointed to have the care of the directinge the towne and forte, and Bycause Sr. John Peyton is of sufficient skill, and resident in the towne the thynk him fytted to undertake the same charges, yf happelie hee shall not otherwise bee employed by Her Majestis speciall commaundement. And then, the Deputie Lieutenants to make choise of some other, whose sufficientie is answerable thereunto.

Also that the governor of Lynne shall, have care to take speedie order, upon anie offered occasion, for the keepinge of the bridges, upon the river of Ouse, between Brandon and Lynne to hinder the passage of the enemye.

Lykewyse, yf the enemy shall happen to approche neare the same towne, that he geve direction, for the cuttinge of the cawsey at Estgate, and the cuvreinge up of the posturnes, and the cuttinge of the bankes, to let in the sea, to inviron the towne and further to doe whatsoever hee shall hold needful to bee performed, for the defence thereof.

And, as for the coaste from Bromehall to Eckles, Waxam, Winterton, and Yarmouth, being at the least ten myles distance

and, in all places, easie to make discente, I doe not see anie further meane to fortifie the same, other then, with certaine bandes of footemen and some horsemen, to bee in redines, to repel the enemie, and that the ordnance, at Winterton and Bromhall, be mounted and placed to the beste advantage for the beatinge of the roade.

And for the towne and haven of Yarmouth, that present care be had, for the making suche ravellings and ditches, according to such directions and plattes, as I leave with the Deputie Lieutenants.

And for the better execution and perfectinge these fortifications and strengtheninge the sea coaste, against forraine attempts, I have thought requisite, that an equall division of the sheire bee made, that the one moytie of the bandes of the souldiers and pioners, of the hundreds adjacent unto Waburne Hoope, may repaire thether, and the other moytie of the countie, convenientlie situated for Yarmouth, may resort thither to be employed as occasion shall require, according to the forme underwritten.

Everie the captaines of the footebandes to have the one haulf of their footebandes, where of one hundredth and fiftie to be of the trained sorte, and the other hundred and fiftie of the untrained, together with 73 pioners, and twenty carriages; and to everie carriage, two able men, with spades, to be at the places and tymes, under written; that the souldiers may bee trained and instructed in matiall discipline, by the officers and to spend some tyme everie day in forwardinge the workes of fortification; and the pioners and carters to be only employed in those labours, and dismissed everie Saturday night.

And for that the yt were necessarie, also, the horsement, might bee there attendinge, as well to joyne, within them in resistinge the enemye, as also, to be exercised and made apte for the use of ther weapon; yt is likewise determined, that the captaines of the light horses and petronells, with their particular charges, according to the order underwritten, shall observe the same course.

\* \* \* \* \*

## APPENDIX No. XI

A NOTE of the Charges for the Chayne Guarding of the  
Navye Royall, &c.

Januarye, 1588.

A note of charges susteyned and paide for the guarding of Her Māte navye Royall, with extra menne residente, as well in Her Highness shippes, as also in barques, pinnaces, brigandines and frigats and for the charge of a great chayne to crosse the ryver, over against Upnore Castle, with a pyece of timber worke made on both sides the saide ryver; and for a house, and twoe greate wheelles, made to the sayde chayne, with lighters anchors and cables, allsoe to ryde by for the boyinge upp of the chayne as alsoe for the stopping upp of Saynte Marye Creeke and other creekes there; and for repayer of Upnore Castell, together with the new makinge of platfformes, flanckers, dyches, &c. requysite for the better defence of the saide navye, viz.—

For the greate chaine of iron, with the workman- shippe and other charges, incidents for the bringing therof from London to Chatham, amounteth to the somme of . . . . .	£250
For the great pyle and tymberwoorke, sett upp, on both sides the ryver, as well to fasten the saide chaine as also a house, and twoe greate wheelles necessarelye made, for the windinge thoughte of the said chaine and for lighters, anckers, and cables, also to ryde by, for the boying upp of the same; amounteth to the somme of . . . . .	360
For the stopping uppe of Saynte Marye creeke, and sundrye other creekes there, requisite for the more safety of Her Highnes shippes, amountinge to the somme of . . . . .	100
For the repayinge of Upnore Castell with tymber, planeke, bricke, lyme, sande, lead workmannship &c. together with the newe makings of platformes, flanckers dyches and rampyers, needful for the better defence of the navye amountinge to the somme of . . . . .	240
For the charges in guardinge of the Navy Royall w <sup>th</sup> ext <sup>r</sup> ordinarye menne, as well in barques, pinnaces brigandines and frigotts, as alsoe in Hir Highness shippes; and for extraordinarie watche, at	

sundrye beacons, next adjoininge to the saide shippes, on both sides the water: amountinge to	420
For rewards unto captaines and others attendinge the saide servyce, aboard Her Highnes shippes, as allsoe downe the ryver to and fro' withe barques pinnaces frigottes &c. dureing the saide service amountinge to the somme of	100
Summa totall . . .	<u>£1,470</u>

W. WYNTER.

JOHN HAWKINS.

WILLIAM HOLSTOCK.

## APPENDIX E

WARRANTS AND LETTERS PATENT RELATING  
TO SALTPETRE

(Record Office)

24 January 1588-1589.

CHANCERY WARRANTS, Series II. Jan. 31 Eliz. File 1497.

MEMORANĎ qđ xxviiij die Januař Anno infrascripto istud bře delibatum fuit Dnō Cancellar Angt apud Westm̃r exequend.

ELIZABETH by the grace of God Queene of England Fraunce and Ireland defender of the fayth &c. To our right trusty and wel-beloved Councillor Sir Christofer Hatton Knight our Chancellor of England greeting We will and commaund you that under our greate seale of England ye cause our letters patentes to be made furth in forme following Elizabeth by the grace of God &c. To all and singular our Justices of peace Maiors Sheriffes Bayliffes Constables Headboroughes and to all other our officers ministers and subiectes to whom these presentes shall come greeting. Know ye that in consideraċon of a greate quantyty of good Corne powder yearlye to be made and delivered into our store within the Tower of London and at a meane rate agreed and covenanted by our welbeloved subiectes George Evelyn esquier Richard Hills and John Evelyn gentlemen of our speciall grace certen knowledge and mere motion and of our prerogative royall by these presentes do gyve and graunt full power lycence

and auethorytie unto the said George Evelyn Richard Hills and John Evelyn their deputies factors and assignes and to every or any of them to digge open and worke for salt Peter within our Realmes of England and Ireland and dominions of the same and all other our dominions where the said Salt peter without fraude or coven shalbe thought meete and convenient to be digged for and founde as well within our owne proper lands growndes & possessions, as also within the landes growndes and possessions of any our subiects set lying or being in any parte of these our Realmes aforesaid (except the Cyty of London, and two myles distant rounde about from the walles of the same City of London, and the Countyes of Yorke Northumberland Westmerland Cumberland and the Bishopricke of Durham And the same Salt peter to trye out and make into powder for our provision as aforesaid for and during the terme of eleven yeares next ensuing the date hereof And further our expresse will and pleasure ys that the said George Evelyn Richard Hills and John Evelyn their deputies factors or assignes shall from tyme to tyme during this our graunte erecte make up againe and lay all flowers stables walles or any other place that shalbe by them or any of them stirred digged overthrowen or pulled downe for the use aforesaid in as good perfection and state as they or any of them did finde the same And yf any varience shall happen to arrise betwene the Petermakers and owners of the said growndes for the causes aforesaid then our will and pleasure is that two of our Justices of Peace next adioyning shall have power by this our graunte to here and determyn the same And lykewise our expresse will and pleasure is that presently upon the sealing of these our letters of Comission for the making of Peter or powder aforesaid all former Comissions heretofore made to any person or persons for the making of Peter or powder to be utterly voyde and of none effecte Willing and comaunding you and every of you by these presentes to be ayding and assisting unto the said George Evelyn Richard Hills and John Evelyn their deputies factors or assignes in all things that shalbe fytt and convenient for the making of Peter and Powder aforesaid upon their reasonable charges having and taking cariages after the rate of four pence the myle. IN WITNES whereof &c. Gyven under our pryvy seale at our Mannor of Richmond the foure and twentyth day of January in the one and thirtyth yeare of our reigne.

WILL. PACKER.

CHANCERY WARRANTS. Series II. File 1636. September.  
41 Elizabeth.

Mđ qđ septimo die Septembř Anno Regni Eliž Rñe quadragesimo  
primo (A.D. 1599) istud bñe delibāt fuit đno Custodđ magni  
Sigilli Anglie apud Westm̃ exequēđ.

ELIZABETH by the grace of God Queene of England Fraunce and  
Ireland defendo<sup>r</sup> of the faith &c. To our right trustie and wel-  
beloved Counsellor Sir Thomas Egerton Knight keeper of our  
greate seale of England GREETING We will and comaund you  
that under our said greate seale being in your custodie ye cause  
our ĩres patentes to be made furth in forme followinge Elizabeth  
by the grace of God &c. To all and singular our justices of peace  
Maio<sup>rs</sup> sheriffes bayliffes constables headboroughes and to all  
other o<sup>r</sup> officers ministers subjectes to whom these presentes  
shall come Greeting Whereas we by our ĩres patentes bearing  
date the eight and twentieth daie of January in the one and  
thirtith yere of our reigne for the consideračon therin menčoned  
did geve and graunt full power licence and authoritie unto our  
welbeloved subjectes George Evelyn Esquior Richard Hill and  
John Evelyn gent. their deputies facto<sup>rs</sup> and assignes and to  
everie or any of them to digge open and worke for saltepeeter  
w<sup>th</sup>in our Realmes of England and Ireland and Dominions of the  
same, and all other o<sup>r</sup> dominions where the said saltepeeter  
w<sup>th</sup>out fraude or covyn should be thought meete and convenient  
to be digged for and found as well w<sup>th</sup>in our proper landes  
growndes and possessions as also w<sup>th</sup>in the landes growndes and  
possessions of any of our subjectes sett lyeing or being in any  
part of those our realmes aforesaid (except the citie of London  
and two myles distant round about from the walles of the same  
citie of London, and the counties of Yorke Northumberland  
Westmerland Cumberland and the Bishoprick of Duresme)  
And the same saltepeeter to trie out and make into powder for  
our provision as aforesaid, for and during the terme of eleven  
yeres next ensuinge the date thereof, as by the said ĩres patentes  
amongest other thinges more at large doth and may appeare  
And wheras also we by other our ĩres patentes under the greate  
seale of England dated the eight daie of January in the two  
and thirtith yere of our reigne for the consideračon therin men-  
čoned did geve and graunt unto Thomas Robinson and Robert  
Robinson or either of them his or their deputies facto<sup>rs</sup> and  
assignes or either of them to be allowed from time to time by

the Master of our Ordenaunce or the Lieutenaunt of the same office full power license and authoritie to digge open and worke for making of saltepeeter in convenient places for those purposes w<sup>th</sup>in our cities of London and Westminster and either of them, and w<sup>th</sup>in the distance of two myles round about from the walles of the Citie of London or from our olde pallace of Westminster w<sup>ch</sup> is our citie of Westminster, as well w<sup>th</sup>in liberties as w<sup>th</sup>out and as well w<sup>th</sup>in our owne landes growndes and possessions as also w<sup>th</sup>in the landes growndes and possessions of any of our loving subjectes whatsoever sett lyeing and being w<sup>th</sup>in our said cities or either of them or the places or distances aforesaid To have hold exercise and enjoy the same authoritie unto the said Thomas Robinson and Robert Robinson and his or their assignes to be allowed as is before menconed for and during the terme of tenne yeres next ensuing the date therof fully to be compleate and ended as by the said last menconed Ires patentees more at large amongst other thinges doth appeare w<sup>ch</sup> said severall Ires patentees and all and evry the power and powers licence and licences authoritie and authorities thereby graunted, and all and everie thing in them or either of them conteyned are by due course of lawe by such as had good and full power thereunto surrendered and yealded up unto us in or Chauncery to be cancelled w<sup>ch</sup> surrenders we doe by these presentes allowe and accept And wheras also we by our Ires patents under the greate seale of England bearing date the six and twentieth day of Aprill in the one and thirtith yere of our reign for the consideracon therin menconed did geve and graunt full power licence and authoritie unto our welbeloved subject George Constable Esquior his deputies factor<sup>s</sup> or assignes to digge open and worke for saltepeeter w<sup>th</sup>in all or any our counties of York the citie of York Nottingham Lancaster Northumberland Westmerland Cumberland and the Bishoprick of Duresme aswell w<sup>th</sup>in our landes growndes and possessions, as also w<sup>th</sup>in the landes growndes and possessions of any our loving subjects sett lyeing or being within any the counties aforesaid To have hold exercise and enjoye the same for and during the terme of eleven yeres next ensuing the date thereof fully to be complete and ended, as by our said last menconed Ires patentees amongst other thinges more at large it doth and may appeare And wheras our loving subjects John Evelyn Esquior Richard Harding Esquior Robert Evelyn gent. John Wrenham gent. and Symeon Furner gent. have undertaken to deliver yerely into our store w<sup>th</sup>in our



Tower of London a greater quantitie of good perfect and serviceable corne gonnepowder meete and serviceable for cannon and calyver shotte at a lesser and lower price and rate then before we paid for the like, as by certain indentures bearing the date of these presentes made betwixt us of th'one pte and the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner of the other part, and in our Court of Chauncery inrolled or to be inrolled, wherby we shall not be driven to seek the said proporcion of gonnepowder out of any foraine contries but shall buy the same w<sup>th</sup>in this our owne kingdome and at a meaner and lower rate and price then we have heretofore paid for the same and have also undertaken to furnish this our realm of England with sufficient store of good perfect and serviceable gonnepowder for the use and provision of our subjectes at and for such reasonable price as in the said indentures is also limited and appointed And wheras our loving subjects are nowe and of long time have been greatly damnified by the excessive waste and spoyle of woodes and are like to be more and more endamaged if the same be not prevented: And wheras also our loving subjects have been excessively charged and encombred w<sup>th</sup> the carriages of the said woodes and of other carriages about the making of saltepeeter and gonnepowder, the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner or some of them have (as we be informed) [in]vented devised and found out by their owne travell industrie costes and charges a very good and profitable device and invencon, by meanes wherof in making of such quantities of saltepeeter, as heretofore have been made, a greate part as well of such wood and fewell as hath haretofore been wasted and consumed, as also of such carriages as have been heretofore employed in and about the making of saltepeeter and gonnepowder shall and may hereafter be saved to the great coñmoditie and benefitt of this Realm, and ease of our loving subjects, w<sup>ch</sup> we principally respect: NOWE KNOEW YE that we of our speciall grace certen knowledge meere mozon and of our prerogative Royall for divers good consideracons us especially moving have given and graunted and by these presents do for us our heires and successo<sup>rs</sup> give and graunt full power licence libertie and authoritie unto the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner and every of them their and every of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes that they the said John Evelyn Richard

Harding Robert Evelyn John Wrenham and Symeon Furner and every of them their and everie of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes and their and everie of their deputies facto<sup>rs</sup> workmen and servantes only and noe others shall and may make and worke for w<sup>th</sup>in our Realms of England and Ireland and either of them and all other our dominions all and all manner of saltepetter and gonnepowder according to the true intent and meaning of these presentes And shall and may have the use and only making and working of all and all manner of saltepetter and gonpowder w<sup>th</sup>in our said Realmes and either of them and other our said dominions according to the true intent and meaning of these presentes And also that they the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their executors administrato<sup>rs</sup> and assignes and their and every their deputies facto<sup>rs</sup> workemen and servants and every of them and noe others shall and may according to the true intent and meaning of these presentes enter search digge open and worke for saltepetter in all convenient places and in due and reasonable manner aswell w<sup>th</sup>in the landes growndes or possessions of us our heires and successo<sup>rs</sup> that now be or hereafter shalbe in the handes possession or occupacion of any the farmers or tenants of us our heires or successo<sup>rs</sup> as also w<sup>th</sup>in the landes growndes or possessions of any the subjects of us our heires or successo<sup>rs</sup> aswell w<sup>th</sup>in liberties as w<sup>th</sup>out w<sup>th</sup>in any of our realmes or dominions where it shalbe meete and convenient w<sup>th</sup>out fraude or covyn for working and digging for saltepetter And the same saltepetter to have take and enjoy to their and everie of their owne uses and to the use and behoofe of their and everie of their executors administrato<sup>rs</sup> and assignes during the terme of tenne whole yeres by these tres patentes menconed to be dismissed and graunted To have holde exercise and enjoy the sole and only making of saltepetter and gonnepowder, and the said power licence libertie and authoritie and other the premisses in and throughout o<sup>r</sup> said Realmes of England and Ireland and all other our Dominions (Except the countie of Yorke the citie of Yorke the counties of Nottingham Lancaster Northumberland Westmerland Cumberland and the Bishoprick of Duresme) unto the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner and to everie of them their and every of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes from hencefurth for and during the terme of tenne whole yeres from hence next ensuing and fully to be complete and ended

And to have holde exercise and enjoye the sole and only making of salte-peeter and gonnepowder and the said power license libertie and authoritie in the said countie of Yorke citie of Yorke counties of Nottingham Lancaster Northumberland Westmerland Cumberland and the Bishoprick of Duresme unto the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their and every of their executō<sup>rs</sup> administrato<sup>rs</sup> and assignes from the last Day of Aprill next ensuinge the date hereof for and during the residue of the said terme of tenne whole yeres then next following and fully to be complete and ended And our will and pleasure is and we straightlie charge and coñmand that the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their and everie of their executor<sup>rs</sup> administrato<sup>rs</sup> and assignes and their and everie of their deputies facto<sup>rs</sup> workemen servantes and assignes shall from time to time during the said terme of tenne whole yeres at their owne proper costes and charges well and sufficientlie erect make up againe laye and repaire all and everie such place and places thing and thinges as shalbe by them or any of them broken stirred digged or in any sorte decayed hindered or defaced for the use or uses aforesaid in as good sorte as the same convenientlie may be And if any variance strife or debate shall happen to arrise or growe betwene any person or persons hereby authorised or having or pretending to have authoritie by or under these our tres patentēs and any of the owner or owners possessor or possessor<sup>rs</sup> of the place or places thing or thinges that shalbe or may be digged or used for the occasion aforesaid by vertue of these presentes for or about the same or for or about any other clause or graunt article libertie or authoritie in these our tres patentēs conteyned or mençoned touching or concerning the digging opening or working for saltepeeter or for the erecting making up layeng or repairing of any of the said place or places thing or things, then our expresse will and pleasure is and we doe hereby for us our heires and successor<sup>rs</sup> geve full power and authority unto two Justices of the Peace dwelling next the place where any such variance shall happen if the same be out of any citie or towne corporate being a countie of it self, and if it be w<sup>th</sup>in any citie or towne corporate beinge a countie of it self, then to the principall officer or officers of such Citie or towne corporate upon complaynte made unto them to call the parties before them, and to heare and determine the controversies betwene them according as they shall in their

wisedomes and discreçons thinke and judge to be just and fitt, and shalbe according to reason equitie and justice w<sup>ch</sup> to doe and execute we straightly charge and cõmaund them and everie of them upon such peines and penalties as belonge to such as obstinately contemne our cõmaundement royall And we straightly charge and cõmaund that such orders and determinaçons as shalbe sett down in that behalf shalbe firmly observed and kepte upon the peines and penalties aforesaid : And yet, if noe order shalbe sett downe and taken by them in that behalfe, or if they cannot ende and determine the same, then we hereby for us our heires and successor<sup>s</sup> do geve full power and authoritie to the Master of the Ordenaunce for the time being or to his deputie or in their absence to the Lieutenant of the Ordenaunce for the time being to heare and determine the same w<sup>ch</sup> also we will and cõmaund to be likewise duely and firmly observed and kept as is aforesaid And wheras in regard of the troublesomenes of this age it is necessarie that a great quantitie of saltepeeter and gonne powder should be made for the better furnishing of our store and defence of our realmes and dominions w<sup>ch</sup> would be to the greate damage of the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes if they should be compelled to keepe the same in their handes and not to have any utterance for the same ; We therfore not mynding that the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their executo<sup>rs</sup> administrato<sup>rs</sup> or assignes or any of them should receave any losse or hinderance in that behalf and yet w<sup>th</sup>all providing for the profitt and ease of our loving subjectes of our speciall grace certen knowledge and mere moçon do by these presentes for us o<sup>r</sup> heires and successor<sup>s</sup> geve and graunt unto the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner and every of them their and everie of their executors administrato<sup>rs</sup> and assignes full power license libertie and authoritie that the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their and everie of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes and their and everie of their deputies facto<sup>rs</sup> servantes and assignes from time to time and at all times for and during the said terme of tenne whole yeres before by these presentes graunted (our owne provision of gonnepowder being duely delivered into our store w<sup>th</sup>in our Tower of London according to the purporte and

meaning of the said indentures, and excepting so much being good perfect and serviceable corne gonnepowder as together w<sup>th</sup> the said store for the time being of us our heires or successo<sup>rs</sup> shalbe sufficient for the defence of these o<sup>r</sup> Realmes and Dominions, and over and above the same, as much also as any merchant or merchantes or any other of our loving subjectes or of our heires or successo<sup>rs</sup> will buy w<sup>th</sup>in any of our Realmes or Dominions for tenne pence a pownde, as in the said indentures is mençoned, and not above, w<sup>ch</sup> they and everie of them shall and may buy at their will and pleasure) shall and may (payeng to us our customes subsidies and other duties whatsoever in that behalf) by license of the lord Trer of England for the time being under his hand and seale in writing, transporte carry and convey out of this our Realm of England or any other our Dominions into any of the partes beyond the seas or other places w<sup>ch</sup> at the time of such transportaçon carriage and conveyance shalbe in league or amitie w<sup>th</sup> us our heires or successo<sup>rs</sup>, only such and so much of the residue and overplus of all such saltepeeter and gonnepowder wherof they shall have such license, as together w<sup>th</sup> our said store there shalbe sufficient of corne gonnepowder, and that perfect, good and serviceable, for the defence of our Realmes and dominions, and over and above the same, as much also as any merchant or merchantes or any other of our loving subjectes or of our heires or successo<sup>rs</sup> will buy w<sup>th</sup>in any of our Realmes and Dominions for or at the rate of tenne pence the pownde, as in the said indentures is mençoned, and not above, w<sup>ch</sup> they and every of them shall and may buy at their will and pleasure. And to the ende that the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner and every of them their and everie of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes, shall and may have and enjoye the full and whole benefitt of this our license and privilege to them before in these presentes graunted according to the teno<sup>r</sup> and true meaning of these our tres patentes We doe hereby for us our heires and successo<sup>rs</sup> of our speciall grace certen knowledge and meere moçon straightlie charge and coñmaund all and every person and persons whatsoever of what estate degree or condiçon soever he or they be (other then the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their and everie of their executo<sup>rs</sup> administrato<sup>rs</sup> deputies facto<sup>rs</sup> and assignes and everie of them, and other then the said George Constable his deputies facto<sup>rs</sup>

or assignes, during the residue only of the said terme menconed to be graunted unto him, and that only in the said countie of Yorke citie of Yorke counties of Nottingham Lancaster Northumberland and Westmerland Cumberland and the Bishoprick of Duresme that they or any of them do not at any time hereafter during the said terme of tenne whole yeres presume or attempt either to make any saltepeeter or gunnepowder w<sup>th</sup>in any of our realmes or dominions, or to transport, bring or send or to cause to be transported brought or sent out of any foraine contrie into any of our said realmes or dominions any saltepeeter or gonnepowder made or to be made w<sup>th</sup>out our said realmes or dominions upon peine that everie person and persons offending in any of these respects shall incurre our high displeasure and suffer such fyne punishment and imprisonment as by any laws or statutes heretofore made or hereafter to be made w<sup>th</sup>in our said Realmes of England or Ireland or any of them can or may be imposed or inflicted upon them and every or any of them for their contempt and disobedience in w<sup>th</sup>standing our coñmaundement and p<sup>re</sup>rogative royall PROVIDED ALWAIES that if at any time hereafter the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner or some of them or their or some of their executo<sup>rs</sup> administrato<sup>rs</sup> or assigns or their or some of their deputie or deputies factor or facto<sup>rs</sup> shall not have so much good perfect and serviceable corne gonnepowder as is hereafter limited expressed menconed and appointed, that is to saie, as much as together w<sup>th</sup> our store of good perfect and serviceable corne gonnepowder shall be sufficient for the service and defence of our said realmes and dominions and also over and besides the same, as much as any merchant or merchantes or any other of our loving subjectes or of our heires or successo<sup>rs</sup> wilbe willinge and desirous, and shall require to buy *bona fide*, at the price or rate of tenne pence the pownd and not above, according to the true meaning of the said indentures to be solde bartred exchanged or otherwise disposed w<sup>th</sup>in any of the realmes or dominions of us our heires or successo<sup>rs</sup> that then it shall and may be lawfull to and for all and everie subject and subjectes of us our heires and successo<sup>rs</sup> to transport into any part beyond the seas and to bring in into this realm of England and Ireland or any other of our Dominions from any the partes beyond the seas, and to bargaine sell exchange and barter all and all manner of saltepeeter and gonnepowder aswell w<sup>th</sup>in our said realmes and dominions as w<sup>th</sup>out payeng therefore to us our heires and suc-

cesso<sup>rs</sup> the customes subsidies and other dueties therefore due and accustomed These presentes or any thing therein conteyned to the contrarie not w<sup>th</sup>standing And we do hereby will and co<sup>m</sup>maund you our said Justices of Peace Maio<sup>rs</sup> sheriffes bayliffes constables and headboroughs and all and singular other our officers ministers and subjectes whomsoever that you and everie of you shall from time to time and at all tymes during the continuance of this our graunt be ayding helping and assisting unto the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner and every of them their and every of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes and their and everie of their deputies facto<sup>rs</sup> servantes and workemen and every of them in the due execucon of the premisses according to the true intent and meaning of these presentes, and for the having and taking of convenient carriages after the rate of fower pence the myle for everie carte or wayneloade after the rate of twentie hundred to the loade, for the carryinge of such thinges as have been heretofore accustomed to be carried in or about the p<sup>re</sup>misses or any of them And our further will and pleasure is and we doe by these presents for us our heires and successo<sup>rs</sup> graunt to the said John Evelyn Richard Harding Robert Evelyn John Wrenham and Symeon Furner their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes and every of them, that these our tres patent<sup>es</sup>, and the power licence libertie and authoritie hereby graunted, and all and everything and thinges herein conveyned shalbe good and effectuell in lawe to them and every of them their and every of their executo<sup>rs</sup> administrato<sup>rs</sup> and assignes according to the true intent and meaning thereof Notw<sup>th</sup>standing the misrecitall of the said before recited tres patent<sup>es</sup> or of the term or termes of yeres or any thing therin conteyned And notw<sup>th</sup>standing the misrecitall or non-recitall of any tres patent<sup>es</sup> or graunt of the premisses or any part thereof at any time heretofore made And notw<sup>th</sup>standing expresse men<sup>ç</sup>on be not made of the thinges hereby men<sup>ç</sup>oned to be graunted or of the true or yerely or other value thereof. And notw<sup>th</sup>standing any statute acte of parliament order proclama<sup>ç</sup>on ordnance lawe usage custome or any other matter whatsoever to the contrarie. In witness &c. Gyven under our Privy Seale at our Manno<sup>r</sup> of Nonesuch the seconde daie of September in the one and fortieth yere of our reigne.

WILL PACKER.

Evelyn et al: licence.

28 April 1629.

Chancery Warrants  
 Series II. 5 Charles 1  
 Bundle 2042. No. 33

M<sup>d</sup>. q̄d vicesimo octavo die Aprilis Anno quinto  
 Caroli R̄ : ista Billa delibať fuit Dño Custodi  
 Magni Sigilli Anglie apud Westm̄ exequend̄.

Charles R.

CHARLES by the grace of God kinge of England Scotland Fraunce and Ireland, defendor of the faith &c. To our right Trustie and right welbeloved Councillor Richard Lord Weston or. high Threr: of England and to our right trustie and right welbeloved Cozens and Councillors Robert Earle of Lindsey our Great Chamberlen of England, William Earle of Pembroke, Lord Steward of or. househould, Edward Earle of Dorsett Lord Chamberlen to or. dearest Consorte the Queene, Dudley, Viscount Dorchester one of our principall Secretaries of State, to or. trustie and right welbeloved Horace, Lord Vere, Master of or. Ordinance, and to or. right trustie and welbeloved Councillor Sir John Coke knight one of or. principall Secretaries of State. And to all and Singuler our Justices of peace, Maiors, Sheriffs Bailiffs, Constables, Headboroughs, and to all other our officers and subjectes to whom it shall appertyne or to whom these presentes shall come, Greeting. WHEREAS at this present time we have more than ordinarie occasion to provide good and sufficient saltpeeter and powder to furnish or. stoares for the defens and safetie of or. Realmes and dominions, And reposing especiall truste and confidence in the understandinge fidelities and care of you the said Lord Threr : Earle of Lindsey Earle of Pembroke, Earle of Dorrsett, Viscount Dorchester Lord Vere, and Sir John Coke, Of or. especiall grace certen knowledgc meere mocion and of or. Prerogative royall, doe by these presents give and graunte full power licence, libertie and authoritie unto you or anie thrie or more of you, your deputies, factors, workmen and servantes and everie of them, to enter break open and worke for Saltpeter as well within the houses, lands, grounds or possessions of us our heires and successors that nowe be or hereafter shalbe, As also in the houses, lands, grounds or possessions of anie of our subjects within or. kingdome of England and dominion of Wales and in all priviledged places within them or anie of them,



and there to have take and use all such ground, earth, walles and water as shalbe thought good, meete or convenient for the making of good and serviceable saltpeeter, and to make the same saltpeeter into gunpowder for or. onlie and speciall service, without fraud or covin, also to have and take cartes and carriages of any of or. loving subjects for the carrying and transporting of all such thinges as are to be used in or about or. said service at and for the pryse of fower pence the myle for everie myle that everie such carte shall goe laden so long as the Saltpeeter men shall and doe performe their undertakings to us, the myles to be accompted as hath been accustomed from place or place, and the emptie vessell to be recaried gratis as formerlie hath bene used and accustomed And wee doe hereby give full power and authority unto the said Lord Threr. Earle of Lindsey, Earle of Pembroke, Earle of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke or anie three or more of you and to yor. deputies factors and servants and everie of them to have and take of anie of or. loving subjects Seacoles at and for a reasonable pryse to be given for everie chaldron of coles soe taken, and also to have and take of anie of our subjects Ashes at and for reasonable pryses to be given for the same And also to have and take workhouses for or. said service, and howese and stables outhoweses and yards of anie of our subjectes and therein to set up vessels and to bestow their servantes, cattell and other necessarie provisions for the effecting the same or. service paying unto the owners or present possessors of such houses, barnes, stables, yarges and outhouses, reasonable rents and rates for the same for the tyme they shalbe used for or. service, And if it shall happen that the owners or possessors of such houses, outhouses, barnes, stables and yarges shalbe obstinate and unreasonable in their demands for or concerning the same, then our will, pleasure and commaund, is that the Maior or other principall officer of anie Cittie Towne Corporate, or anie other priviledged place where such controversie shall aryse doe view and see the places and upon consideracion had thereof and of the tyme the same shalbe used, to set such reasonable and indifferent pryses as they shall thinke meete to be given in satisfaction, And if it shall happen to be out of anie Cittie or Towne Corporate or privileged place then or. pleasure and command is that the next Justice of peace doe upon like consideracion taken, set reasonable pryses of all such places so desired to be had and used as aforesaid, according to which

pryses so set downe we likewise command that paiement be trulie made by the said Lord Threr. Earle of Lindsey, Earle of Pembroke, Earle of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke, or anie three or more of them, their deputies, factors or servantes or by some of them, And or. will and pleasure is and wee doe hereby straightlie charge and command the said Lord Threr. Earl of Lindsey, Earle of Pembroke, Earle of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke or anie three or more of them their deputies, factors, workmen and servantes and everie of them, that they do from time to time with all convenient speed erect, make up againe, lay and repaire all such place and places, thinge or thinges whatsoever as shalbe by them or anie of them open, digged, stirred, hindred or defaced for any of the purposes aforesaid, in as good sort as convenientlie the same may be, And if anie controversie, variance, stryfe or debate shall happen to aryse or grow betwixt anie of the deputies of the said Lord Threr. Earle of Lindsey, Earle of Pembroke, Earle of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke, or anie three or more of them, or anie the workmen or servantes of the said deputies and anie of or. lovinge subjectes about the digging or working for Saltpeter, or about the having or taking of anie cartes, carriages or other things whatsoever fitt and necessarie and before granted or intended for the better execucion of this service, or about the making up againe, laying or repaying of anie floores, grounds or walls digged, broken or used for the same, if it be in anie cittie, Towne Corporate, or other privileged place. Then or. will, pleasure and command is that the Maior, Sheriff, Bayliff or other principall officer of anie such place, or if it be out of anie such Cittie, Towne, Corporate or other privileged place, that then the next or nearest Justice of the Peace Upon complaint made to them or anie of them, call all such persons before them and doe heare, decyde and determine all and everie such controversies in such sorte as they in their discrecions shall thinke to be agreeable to the true intent and meaninge of these presents And for the furtherance of or. said service we straightlie charge and command all and singular our Justices of Peace, Maiors, Sheriffs, Bayliffs and other principall officers whom according to the true intent and meaning hereof it shall or may concerne, to do and execute the premises with effect as they tender or. royall commandement and the furtherance of this or. so great and waightie service, and what order or orders shalbe by them or anie of them soc made

and sett downe being according to the true intent and meaninge of these presents, We straightlie charge and command to be observed and kept And if no order shalbe by them taken or sett downe, Then wee doe hereby give full power and authority unto the said Lord Threr. Earle of Lindsey, Earle of Pembroke, Earle of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke and to the rest of the Officers of or. ordinance for the time being or any three or more of them (whereof the Master of the Ordinance, the Lieutenant, Master Surveyor or Clerk of or. said ordinance to be alwaies one) by their warrantes directed and delivered to anie the messengers of or. Chamber to call before them all such person and persons as shalbe nominated unto them to disobey or. authoritie and royall commandement herein, or to deny unto the deputies of the said Lord Threr. Earle of Lindsey, Earle of Pembroke, Earl of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke, or anie three or more of them as aforesaid or unto the factors workmen or servantes of the said deputies or anie of them, such things as are hereby required to be allowed unto them for the better execucion of this or. Service, or shall delay the doing thereof or be partiall therein and to examine, heare, decyde and determyne all such controversies or causes as shall aryse thereupon and to inflict punishment upon every such offender and offenders by imprisonment or otherwise as contemnors of or. royal authoritie and command, or otherwise to certifie unto the Lords of or. Privie Councell, such offenders with their offences that such further course may be therein taken as shalbe thought most fitt, And for doing of all and singuler the premises these or. letters patents or the inrollment of them shalbe unto all men whom it shall concerne a sufficient warrant and discharge without any other commission or further warrante to be had procured or obteyned, And or. will and pleasure is that all such orders as shall according to or. pleasure herein declared be made and sett downe shalbe inviolable kept observed and fulfilled, And or. further will and pleasure is, that all and everie one of the deputies, factors, workmen and servants aforesaid, and everie of them and everie of their horses, cartes and carriages used or employed in about or concerninge this or. service be exempte and freed from all other service or services whatsoever to be done or performed for or to us or. heires or successors and from paying any taxes or towle in anie place or places within this or. kingdome or from being pressed or taken by anie of or. officers for any other service whatsoever. And

whereas wee are given to understand that divers persons doe #pave or gravell their dovehouses or use other devises therein whereby the verie generacion of the myne of Saltpeeter is in danger to be destroyed and that few doe take care to preserve and increase the mynes thereof, wee therefore, for the preservation of the said myne which is so usefull and necessarie for the safetie of or. kingdomes, doe by these presentes for us our heires and successors give unto you or anie three of you power to contract with any of your deputies for making of saltpeeter for a certain term under such conditions as yee shall thincke fitt for our service, and doe straightlie charge and command all and everie person and persons whatsoever within or. said Realmes and dominions that they nor anie of them doe at any tyme or tymes hereafter pave or gravell their dovehouses or use anie other meanes whereby the said myne or growth of saltpeeter may be prejudiced but shall permitt and suffer the said Lord Threr. Earle of Lindsey, Earl of Pembroke, Earl of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke or anie three or more of them their deputies, servants, factors and workmen and everie of them to digg and open the sames in convenient manner and at convenient tymes of the day and to lay the same earth, which they digged and took from out of the said dovehouses, into the said dovehouses againe, after they have wrought the same, to the ende the myne of Saltpeeter may be the sooner renued, upon paine of contempt and of or. high displeasure in that behalfe And wee do hereby further charge and command all Justices of peace, Maiors, Sheriffs Constables and other officers within and thorough or. kingdom of England and dominions of Wales, that they and everie of them doe from tyme to tyme aide and assist or. saltpeeter makers and Gunpowder makers their factors and servants and everie one of them in their doing of this or. service, And in taking of undelayed order concerninge all controversies that shall aryse that or. service may not be hindered or delayed thereby, nor the doers thereof unjustlie vexed or molested in or for the doing thereof, And or. will and pleasure is that this or. commission and all the liberties, priviledges and authorities therein And thereby given and graunted unto the said Lord Threr. Earle of Lindsey, Earle of Pembroke, Earle of Dorsett, Viscount Dorchester, Lord Vere and Sir John Coke, or anie three or more of them, their deputies, factors, workmen and servants shall be effectuell to all intents, effects and purposes, anie law, statute, acte, proclamacion,

restraint or provision to the contrarie hereof made notwithstanding.

In Witness, &c. Witness &c.

Exr. per Ro. Heath.

Maie it please your most excell. Mat<sup>tie</sup>.

This conteyneth your Ma<sup>ties</sup> Commission to the Lord Threr. and other the Comm<sup>rs</sup>. for the Admiraltie and to the Maister of your Ordinance, authorising them or such as they shall appoint to digge and take earth in anie place or places for the making of Saltpcester and making the same into Gunpowder for yor. M<sup>ties</sup>. speciall service And is done with the like clauses conteyned in a commission heretofore made to the Duke of Buckingham and Earle of Totnes for the execucion of this Service.

Signified to be yor. Ma<sup>ties</sup>. pleasure

by Mr. Secretarie Coke,

Ro. Heath.

Recept 28 April 1629

(Endorsed)

Charles R.

Our will and pleasure is

That this Bill pass by imediate warrant.

## APPENDIX F

### EXTRACTS FROM WAR OFFICE RECORDS

(Record Office)

#### WAR OFFICE RECORDS

Class 55, Vol. 331

(Entry Books of Warrants and Orders in Council)

At ye Court at Whitehall ye

13th day of Janu<sup>ry</sup>, 1664 (-65)

Present :

The King's Most Excellent Ma<sup>tie</sup>.

His R.H. y<sup>e</sup> Duke of Yorke

L<sup>d</sup> Archbish<sup>op</sup>. of Canterbury

Lord Privy Seale

Duke of Buckingham

Duke of Ormond  
 Marquesse of Dorchester  
 Lord Chamberlaine  
 Earle of Bathe  
 Earle of Lauderdaile  
 Earle of Carberry  
 Lord B<sup>PP</sup> of London  
 Lord Wentworth  
 Lord Berkeley  
 Lord Ashley  
 Mr Vice Chamberlaine  
 Mr Treasurer  
 Mr Secretary Bennett  
 Mr Secretary Morrice  
 Mr Chauncellor of y<sup>e</sup> Dutchy

WHEREAS his Ma<sup>te</sup> by his Warr<sup>t</sup> under his Royall Signe Manuell and Privy Signett to us directed hath Co<sup>m</sup>manded us to make contractes w<sup>th</sup> powder-makers for y<sup>e</sup> bringing to his Ma<sup>te</sup>'s stores good and serviceable powder AND WHEREAS Josias Dewye powder-maker hath made a contract w<sup>th</sup> us for making of gunpowder and bringing y<sup>e</sup> same into his Ma<sup>te</sup>'s stores in y<sup>e</sup> Tower soe long as his Ma<sup>te</sup> findes him Petre, In pursuance of his Ma<sup>te</sup>'s co<sup>m</sup>mande (and y<sup>t</sup> his Ma<sup>te</sup>'s service may noe wayes bee hindred) Wee have thought fitt and doe hereby authorize and appoint you the said Josias Dewye to take into yo<sup>r</sup> possession and custody y<sup>e</sup> powdr mills and workes now at Chillworth and att Casshalton in y<sup>e</sup> county of Surrey or any other place y<sup>t</sup> belongs.

Class 47, Vol. 6, Folio 106

(Ordnance Minutes)

(Vol. endorsed.)—‘A Journall begining the 8<sup>th</sup> of June 1664 & ending the 21<sup>th</sup> Februy. 1664[–5].’

‘At ye Court att Whithall the 2<sup>d</sup> of January 1664[–5].’

Present

The Kings most excelent Maj<sup>tie</sup>  
 His R. Highess ye Duke of Yorke.  
 Lord Privy Seale.  
 Duke of Albemarle.  
 Duke of Buckingham.

Lord G<sup>t</sup> Chamberlaine.  
 Lord Chamberlain.  
 Earle of Berkeshire.  
 Earle of St. Alban.  
 Earl Beath.  
 Earl of Lauderdale.  
 Lord Bp<sup>d</sup> of London.  
 Lord Berkeley.  
 Lord Ashley.  
 Mr. Treasurer.  
 Mr. Vice Camberline.  
 Mr. Secretary Morrice.  
 Mr. Secretary Bennett.  
 Mr. Chancellor of y<sup>e</sup> Dutchy  
 S<sup>r</sup> Ed. Nicholas.

His R. Highnes this day representeing to his Ma<sup>tie</sup> in Councell  
 y<sup>e</sup> great want of Mills to be imployed for y<sup>e</sup> makeing of gunn-  
 powder his Ma<sup>tie</sup> necessarily requireing the same att y<sup>s</sup> season  
 It was therupon ordered That y<sup>e</sup> Comm<sup>rs</sup> for Ma<sup>r</sup> of his Ma<sup>tie</sup>  
 Ordnance and y<sup>e</sup> Officers of y<sup>e</sup> same are authorized to impreste  
 soe many Mills for y<sup>e</sup> makeing of gunnpowder for his Ma<sup>tie</sup>  
 Service as they shall think fitt.

\* \* \* \* \*

7<sup>o</sup> January 1664

(Fol. 109.)

\* \* \* \* \*

Memorand.—Delivered to y<sup>e</sup> Lord Berkley 2 Estimates y<sup>e</sup>  
 one for providing 1500 Ordnance of Iron Shott carriages and  
 two C. tonne of Copper Mettle amounteing to                      The  
 other for providing of peetre, building of powd<sup>r</sup> Mills and stoneing  
 and repaireing of powd<sup>r</sup>.

21 July 1664.

Class 47, Vol. 6, Folio 16

(Ordnance Minute)

(Vol. endorsed.)—‘Journall beginning the 8th of June 1664  
 & ending the 21st Feby. 1664[-5].’

‘Mr. Clark.’

‘Wee have recd. yors. both, ye one dated 9 ye other 17 July  
 1664. Ye former informes us of ye unreasonable demands of  
 ye proprietors. of ye Ground at Portsmouth which is intended

to be built upon for his Maties Service. Our desire is yt. you would upon ye receipt of this treat once more w<sup>th</sup> them and bring them if possible to reasonable Termes wch. if they will not bee perswaded to wee would have you repaire to ye Mayor and Aldermen of ye towne and acquaint them wth. his Ma<sup>ties</sup>. pleasure of purchaseing yt. ground to build Storehowses upon for his service, and desire them yt. they would appoint a Jury to make a reasonable value thereof betweene ye King and them and to returne this Accompt to us wth. all convenient speede, By ye latter of yors. wee understand Sr. Phillip Honywood is upon cleaning the Dock and that hee offers to furnish ye Clay and soyle if wee can agree for the filling up the Gun wharfe wch. wee intend to build. Wee desire you would treat wth. him and know his lowest Rate yt. hee will afford ye same by ye yard for filling up a Gun wharfe and as for ye timber wch. Sr. Wm. Penn proposed to you wee would have you not to make any further mencion of it till you receive directions from us wch. is all at present from

Yor. loveing freinds'

'Office of the Ordnce.

21st July 1664.'

Class 55, Vol. 332, page 137

(Warrants and Orders of the Privy Council)

At ye Court at Whitehall  
the 3<sup>d</sup> of April, 1667.

Present :

The King's Most Excellent Ma<sup>tie</sup>  
His Roy<sup>ll</sup> Highness ye Duke of Yorke  
Lord Arch B<sup>pp</sup> of Canterbury  
Lord Chancellor  
Lord Privy Seale  
Duke of Albemarle  
Marques of Dorchester  
Lord Chamberlain  
Earle Bridgwater  
Earle of Berkshire  
Earle of Anglesey  
Earle of Bathe  
Earle of Carlisle  
Earle of Craven



Earle of Lauderdale  
 Viscount Fitz Harding  
 Lord Arlington  
 Lord Berkeley  
 Mr Comptroller  
 Mr Vice Chamberlaine  
 Mr Sec<sup>y</sup> Morrice  
 Sr. W<sup>m</sup>. Coventry

After our hearty Comendations WHEREAS ye King's most Excellent Ma<sup>tie</sup> by his Warr<sup>t</sup> to us directed hath thought fitt to erect and make new Fortes at Har<sup>wch</sup> and alsoe to fortifie his Guarrison of Landguard Fort, for y<sup>e</sup> better carrying on of y<sup>t</sup> service, and for ye paying of workemen and likewise for provideing of severall provisions, as Timber, Bricke, Stone, Lime and other Materialls for y<sup>e</sup> same WEE have thought fitt to imprest unto Mr Francis Nuby, storekeeper for us at Har<sup>wch</sup> y<sup>e</sup> sume of 100<sup>l</sup>. These are therefore to pray and require yo<sup>a</sup>, forthw<sup>th</sup> to make an allowance unto y<sup>e</sup> y<sup>e</sup> [sic] said Francis Nuby by way of imprest and upon accompt of y<sup>e</sup> s<sup>d</sup> sume of 100<sup>l</sup> for y<sup>e</sup> use aforesaid, yo<sup>a</sup> placing y<sup>e</sup> same upon y<sup>e</sup> Privy Seale now pasing for 20000<sup>l</sup>. for new fortificacons &c. hee giving an accompt to us whenever required how and w<sup>ch</sup> way hee shall lay out and pay y<sup>t</sup> sume, and for soe doing this shal bee your Warr<sup>t</sup>. Soe bidding yo<sup>a</sup> heartly farewell Wee rest

Yo<sup>r</sup> loving freinds

J. BERKELEY

J. DUNCOMBE.

To our honor<sup>d</sup> freind Collo<sup>ll</sup> Legge

L<sup>t</sup> Gener<sup>ll</sup> of his Ma<sup>ty</sup> Ordnance &c.

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Class 47, Vol. 19, Part 1.  
 (Ordnance Minutes—Series I)

‘ 20<sup>th</sup> March 1668–9

‘ Present

Lord Berkley

S<sup>r</sup> John Duncombe

L<sup>t</sup> Generall

all y<sup>e</sup> Officers but

ye Clerke of y<sup>e</sup>

Deliveries ’

‘ Memd. a signification from y<sup>e</sup> Rt. hono<sup>ble</sup> y<sup>e</sup> Com<sup>rs</sup> for executing y<sup>e</sup> Office of Ma<sup>r</sup> of His Ma<sup>ts</sup> Ordnance appointing y<sup>e</sup> building

2 new Forts att Chatham by Gillingham and Cockham Wood  
S<sup>r</sup> Bernard De Gome Jonas Moore Esq<sup>r</sup> and Major Mathew Baylie  
to oversee ye same. Signed—J. Duncombe Tho. Chicheley'

'Tower 20<sup>th</sup> March 1668-9'

'To our honored Freind Coll. W<sup>m</sup> Legg Lt Gene<sup>ll</sup> of his Ma<sup>ts</sup>  
Ordnance and to our Loveing Freinds y<sup>e</sup> rest of y<sup>e</sup> Officers of y<sup>e</sup>  
same.'

\* \* \* \* \*

Instructions for S<sup>r</sup> Bernard de Gome K<sup>t</sup> his Ma<sup>ts</sup> cheife  
Engineer Jonas Moore Esq<sup>r</sup> Assistant Surveyor and Major  
Mathew Bayley Governour of Upnor Castle appointed Com<sup>rs</sup>  
for y<sup>e</sup> Manageing and lookeing after y<sup>e</sup> Building 2 new Betteryes  
or Redouts neere Gillingham for y<sup>e</sup> better security and safety  
of his Ma<sup>ts</sup> Navy in y<sup>t</sup> Harbour In pursuance of a signification  
from y<sup>e</sup> R<sup>t</sup> Hono<sup>ble</sup> y<sup>e</sup> Com<sup>rs</sup> for Ma<sup>r</sup> of His Ma<sup>ts</sup> Ordnance  
bearing date y<sup>e</sup> 20<sup>th</sup> day of this instant'

'You are forthwith to repair downe to Gillingham and on  
y<sup>t</sup> side as alsoe at Cockham Woodend (where two new Batteryes  
or Redoubts are designed to bee erected and Built y<sup>t</sup> is owne at  
each place) and there to sett out or stake out at each of y<sup>e</sup>  
aforesaid places soe much ground as will bee necessary for this  
Service w<sup>ch</sup> Batteryes or Redouts are to be built according to  
y<sup>e</sup> Demensions and designs of S<sup>r</sup> Bernard de Gome exprest and  
sett downe in his two severall draughts of y<sup>e</sup> same presented to  
y<sup>e</sup> Com<sup>rs</sup> at y<sup>e</sup> stakeing and setting out of w<sup>ch</sup> ground two of you  
at least are to bee alwaies present whereof Jonas Moore Esq<sup>r</sup>  
to bee one'

'You are to Contract for and buy such and soe much parcell  
of Ground at each of y<sup>e</sup> aforesaid places of y<sup>e</sup> Owners and Pro-  
prietors thereof as will serve to Build y<sup>e</sup> said Batteryes or Redouts  
upon, and at y<sup>e</sup> cheapest rates yow and they can agree for att all  
w<sup>ch</sup> contracts and Bargaines makeing two of you at least are  
alwaies to bee present and to sett your hands to all such Contracts  
and Bargaines made whereof Jonas Moore Esq<sup>r</sup> alwaives to  
bee one'

'You are to Contract for and provide all such Timber Bricks  
Stone Lyme or any other necessities as shall be requisite and  
fitting for y<sup>e</sup> carrying on and performance of y<sup>e</sup> said workes  
accordingly and to hyer and employ such and soe many Worke-  
men as you shall judge requisite and fitting to bee employed for  
y<sup>e</sup> more speedy and effectuall dispatch thereof in y<sup>e</sup> doeing

and performeing of w<sup>ch</sup> two of you are alwaies to bee present and signe to all Contracts agreements or bargaines made on this behalfe whereof Jonas Moore Esqr. is alwaies to be one'

'You are two of you at least whereof Jonas Moore Esqr alwaies is to be bee one to signe and Drawe Bills from tyme to tyme upon such persons as y<sup>e</sup> R<sup>t</sup> hono<sup>ble</sup> y<sup>e</sup> Com<sup>rs</sup> for Ma<sup>r</sup> of his Ma<sup>ts</sup> Ordnance and y<sup>e</sup> Board shall appoint for y<sup>e</sup> payment of such moneys as you shall informe y<sup>e</sup> Board will bee requisite for carrying on y<sup>e</sup> same you causeing an Accompt to bee kept how and w<sup>ch</sup> way y<sup>e</sup> said Moneys are disbursed and for what, w<sup>ch</sup> Accompts yo are to cause to be sent up to y<sup>e</sup> Board from tyme to tyme soe often as it shall be required'

\* \* \* \* \*

'and you are alsoe by vertue of this Press Warrant herewith sent you to take up and imprest such and soe many Vessells, Barkes, Boates, Carts, horses and workemen as there shall bee occasion to bee employed about y<sup>e</sup> said Ports untill such tyme as they be finished.

F.N.

E.S.'

'Office of Ordnance

20th March 1668-9'

'To S<sup>r</sup> Bernard De Gome K<sup>t</sup> his Ma<sup>ts</sup> cheife Engineer Jonas Moore Esqr Assistant Surveyor, and Major Bayley Governour of Upnor Castle or two of them, provided Jonas Moore Esqr bee alwaies one

These.'

'Memd. a Press Warr<sup>t</sup> for S<sup>r</sup> Bernard De Gome Jonas Moore Esqr and Major Mathew Bayley Com<sup>rs</sup> to presse workemen for y<sup>e</sup> Fortificacons and Redouts to bee new made at Gillingham and Cockham Wood F.N. E.S.

'To S<sup>r</sup> Bernard de Gome Jonas Moore Esqr or Major Mathew Bayley or two of them provided alwaies Jonas Moore Esqr be one.'

1 Sept. 1681

Class 47, Vol. 10, Folio 78

(Ordnance Minutes)

'1st September 1681'

'Present

S<sup>r</sup> John Chicheley

S<sup>r</sup> Christop. Musgrave

L<sup>t</sup> Generall

Surveyor

Storekeeper

Clerke of the Deliverys

Ordered

That a State be drawne up, fitt to be presented to Councill by the Comis<sup>rs</sup> for Ma<sup>r</sup>. Generall of his Ma<sup>ty</sup>s Ordnance of the case represented by Maj<sup>r</sup>. Beckman in his Lre. and Certificate from Hull touching the purchase of some ground there for a Fortificacon to be built for the better Strengthening the said Towne to enquire of S<sup>r</sup> Bernard De Gome, what measures were taken and what course was used aboute takeing in of the Lands for the new worke at Plymouth, and after what method the owners of those lands were sattisfied and paid for the same'.

'To see what Statutes there are concerneing takeing up of Peoples Lands for building of Fortificacons upon'

'Coppie of Maj<sup>r</sup> Beckmans Lre. and Certificate from Hull touching the Demand of the Owners of the Ground for the purchase thereof for a new Fortificacon to be built thereon to be sent to the Lord Mulgrave Governo<sup>r</sup> desireing his Lord<sup>sh</sup> would please to give such effectual Orders for promoteing the dispatch thereof as his Lord<sup>sh</sup>. should thinck fitt, to prevent the Obstruction of the goinge on therewith'.

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' 10 Septemb. 1681 '

(Folio 81)

' Present

S<sup>r</sup> Chris. MusgraveL<sup>t</sup> Generall'.

\* \* \* \* \*

' Ordered

That a Bill and Debentur be forthwith made unto M<sup>r</sup> John Suffield for the sume of 22<sup>l</sup> 10<sup>s</sup> 00<sup>d</sup> for his charge and paines in proeureing Coppies of the Deedes for the Land taken in at Gosport'.

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Class 47, Vol. 19, Part 1.

(Ordnance Minutes—Series I)

' 24th November 1668 '

' Present

Com<sup>r</sup> ChicheleyL<sup>t</sup> of y<sup>e</sup> OrdnanceAll y<sup>e</sup> Officers

Ordered

That Major Mathew Bayly Governo<sup>r</sup> of Upnor Castle pay unto John Norwood the Sume of twenty shillings for a yeares rent for his ground upon w<sup>ch</sup> Middletons Battery stands w<sup>ch</sup> yeare ended att Middsummer last and that he likewise pay 30 shillings more to y<sup>e</sup> owners of y<sup>e</sup> Land whereon James's Sconce stands for a yeares rent ending att y<sup>e</sup> same tyme '

Class 47, Vol. 19, Part 1. Minutes—Series I

(Ordnance Minutes)

' 22<sup>th</sup> December 1668 '

' Present

Com<sup>r</sup> ChicheleyAll y<sup>e</sup> Officers except y<sup>e</sup> Clerke of the Delyveryies

Ordered

That y<sup>e</sup> Sume of fourty shillings be allowed and Debenture made to M<sup>r</sup> John Burnsted for damage done to his Ground &c. Fence in ye time of y<sup>e</sup> proveing the Morter peece nere Bishopps hall '

30 July 1674

Class 47, Vol. 19, Part 11.—Minutes.—Series I

(Ordnance Minutes)

Present

M<sup>r</sup> Gen<sup>ll</sup> OrdnanceLt. Gen<sup>ll</sup>

Clarke Ord.

Storekeeper

Treasurer

Ordered

That M<sup>r</sup> Perkinns att Portsm<sup>o</sup> be writt to, to finde out what convenient Store Roomes are to be hyred there for lodgeings his Ma<sup>ts</sup> stores for this Office and y<sup>t</sup> he send up word to y<sup>e</sup> Office att what Rent per annum y<sup>e</sup> same may be had.

Class 46, Vols. I &amp; II.

(Out-letters—Master General, Board and Commander-in-Chief.)

Folio 214d

A.D. 1660 to 1684

CHARLES R.

WHEREAS Wee have thought fitt for the better defence and Security of Our Towne of Kingston upon Hull to strengthen the same with a New Fortification (Besides the Blockhouses and

Castle, Which Wee have Ordred likewise to be Repaired against any Hostile Attempts) According to a designe drawne & Presented to us by Major Martin Beckman One of our Engineers and by us well approved of, and Confirmed under our Signe Manuall OUR WILL and PLEASURE is, and Wee do hereby Authorise and require you, that you doe Forthwith take course to beginn, and with what convenient speed may be, To cause y<sup>e</sup> said Fortification to be Erected, and Built according to the above mentioned Designe By us already approved of. AND if any Ground which is not our owne shall be found Necessary to be taken in for this Service Wee doe hereby authorise and Impower you to cause the same to be contracted for and bought of the Owners at the cheapest Rates the same may be had AND Wee doe hereby Further Authorise and Impower you (in case you shall Judge it requisite and Necessary for the better and more Effectuall carryeing on of the Said Intended Fortification) to Nominate, Constitute, And appoint Such Comission<sup>rs</sup> or Officers as you shall thinck Fitt. (Our Governo<sup>r</sup> Lieu<sup>t</sup> Governo<sup>r</sup> or Comander in chiefe for the time being, And Major<sup>r</sup> Martin Beckman, or one of them to be alwayes of y<sup>e</sup> QUORUM) to See y<sup>e</sup> worke duely Performed according to Undertaking and Contract, and to make unto the Officers Such Salaries, Allowances, &. Wages for theire Care, Paines and Attendance therein, and incident charges as shall by you be thought reasonable, AND for Soe doinge this shall be yo<sup>r</sup> Warrant. GIVEN at Our Court at Windsor the Tenth day of August One thousand Six hundred, Eighty & one, And in the Three and Thirtieth yeare of our Reigne.

By his Maj<sup>ts</sup> Comand

CONWAY.

TO our Trusty and Wellbeloved Our Comission<sup>rs</sup> for Executing y<sup>e</sup> Office of Our Ordnance, Or to Our Master of y<sup>e</sup> Ordnance for y<sup>e</sup> time being.

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Class 47, Vol. 1.

(Ordnance. Out-letters—Master General, Board and Commander-in-Chief.) Folio 288d

M<sup>r</sup> WATKINSON

In pursuance of an Ord<sup>r</sup> this day of y<sup>e</sup> Board You are hereby desired Forthw<sup>th</sup> to take Care y<sup>e</sup> all his Maj<sup>t</sup> Stores Lyeing out in hyred Warehouses or Cell<sup>rs</sup> for w<sup>ch</sup> his Maj<sup>ty</sup> is at charge of payeing rent be Forthw<sup>th</sup> Remooved and Carried into y<sup>e</sup> South Blockhouse according to Former Ord<sup>r</sup> and there layd as well as you can for y<sup>e</sup> present ; till Such tyme as y<sup>e</sup> Said Storehouses

be compleated & Fitted up That you may lay y<sup>e</sup> Stores in bett<sup>r</sup> Ord<sup>r</sup> hereafter, The Dep<sup>te</sup> Gov<sup>r</sup> of Hull hath now ord<sup>rs</sup> from y<sup>e</sup> R<sup>t</sup> Hon<sup>ble</sup> ye L<sup>d</sup> Mulgrave to make Roome in y<sup>e</sup> South Block-house for y<sup>e</sup> S<sup>d</sup> Stores accordingly, w<sup>ch</sup> is all att present From  
Yo<sup>rs</sup> & c<sup>a</sup>

19<sup>o</sup> Septemb<sup>r</sup> 1682.

Att Hull.

Class 47, Vol. 22 (Ordnance Minutes—Series II, page 249)  
Sabbati 7<sup>o</sup> Die Julii, 1705.

Present :

Clke Ordnance	}	Ordered.
Storekeeper		
Clke Delies		

That upon reading a petiton of Mary Clarke, wife of Patriek Clarke, setting forth that in cons of the great loss her father and self had suffered by having 3 houses, &c., pulled down w<sup>ch</sup> stood on Tower Wharfe which he had purchased, and that others who had suffered in the like kind, had received a valuable consideration, and her father and she only the liberty of a small shedd built on his ground, That the office of Ordnance having occasion for the same peice of ground to build a Plumbery on for the office service the s<sup>d</sup> shedd was pull'd down and another allotted her in compensa<sup>on</sup> by the Rt. Honble. the L<sup>d</sup> Dartm<sup>o</sup> and the then Principal Officers of y<sup>e</sup> Ord<sup>ce</sup> over against where y<sup>e</sup> other stood, all w<sup>ch</sup> allegation being attested by Joseph Hone a gunn<sup>r</sup> and John Robins a labourer belonging to the office who had lived for many years upon y<sup>e</sup> s<sup>d</sup> wharfe, It is ordered that upon y<sup>e</sup> af<sup>d</sup> cons the s<sup>d</sup> M<sup>rs</sup> Clarke do keep in po<sup>ss</sup>on of y<sup>e</sup> s<sup>d</sup> shedd by right from y<sup>e</sup> office of Ord<sup>ce</sup>.

Class 47, Vol. 30

(Ordnance Minutes—Series III)

Old Palace Yard Westminster—Martis 20<sup>o</sup> die Maii 1717.

Present

Lieut Gen <sup>l</sup>	}	Order'd
Surveyr Gen <sup>l</sup>		
Clk of the Ordnance		
Storekeeper		
Clk of the Deliveries		
&		
Chief Engineer		

\* \* \* \* \*

Coll<sup>o</sup> Lilly informed ye Board that Mr. Edgecumb can not grant or convey the ground to build the storehouses upon at Plym<sup>o</sup> without an Act of Parliament, whereupon Mr. Ash was desired to speak to him about ye same and to give one Mr. Moyle agent for . . . notice to attend the next board.

\* \* \* \* \*

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Class 47, Volume 32  
(Ordnance Minutes—Series III)  
Old Pallace Yard Westminster—Martis 10<sup>o</sup> Die Februarii 1718–9  
Present

Surveyor Generall	}	Ordered
Clerk of the Ordnance		
Storekeeper		
Clerk of the Deliveries		
Chief Engineer		

\* \* \* \* \*

(A letter) to Mr. Dixon, storekeeper at Plym<sup>o</sup> advising him, that just as the Board was concluding an agreem<sup>t</sup> with S<sup>r</sup> Nicholas Morrice for the ground whereon to build a gunwharfe and storehouse near the Dock, one Mr. Kent demands an exorbitant value for his house and interest of part of that ground let to him upon lease by S<sup>r</sup> Nicholas to go to him and immediately offer his right and pretension the sum of £180—which is more than formerly he offered to sell it for and if accepted, to gett Articles of Agreement drawn up to confirm the bargain.

And another to him with private instructions upon that head.

\* \* \* \* \*

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Class 44. Vol. 242  
(Ordnance Minutes)

Received this 13th day of April 1758 of the Right Honble and Honble the Principal Officers of his Majesty's Ordnance by the hands of Farmer Thomas Hopkins the sum of Twenty one pounds and eight Pence being for one years Rent and Damage sustained for the enclosed March Land I occupy adjoining Hilsey Common whereon the Line & Batteries are erected near Portsea Lake.

Witness my hand  
WILLM. HOPKINS



Class 30, Vol 54 No. 21

GENERAL ROY'S PAPERS

23rd September 1775

DIMENSIONS of Mr. Le Marchant's buildings proposed to Colonel Roy to be rented to Government for barracks, with the conditions of such rent

## PARTICULARS OF BUILDING

Mr. Le Marchant's terms are to receive £150 down, to be subject to no alterations or repairs, for one year's rent of the above mentioned buildings and ground, and if kept longer than a year the rent to be reduced to £100 per year, to be advanced every half year, at the beginning of each half year, but if the rent is not advanced, then Mr. Le Marchant's demand is £160 for one year certain, payable £80 after the first six months, and the other £80 at the year's end

And after the first year the rent to be continued by the half a year at £100 a year, payable half yearly

If Government thought proper to allow £20 towards making a pump to the well, as it is so deep, Mr. Le Marchant, for the greater conveniency, would pay the surplus, the pump remaining afterwards his property, the use of the said well or pump in either case to be also preserved, in common with the soldiers, to his people and tenants on the premises

Government to be at liberty to make chimneys, doors, windows, and partitions in any of the premises, and to erect any building on the ground as far as the road, but if necessary the same to be placed at such a distance from the road as not to incommode the persons passing through the same

That as to any fixtures of beds or wooden partitions or floors within the said buildings, that Government shall have a right to take any the same on quitting the premises, but not any doors, windows, masonry work or the rails that may be made to enclose the premises

GUERNSEY the 23rd September 1775

WILL LE MARCHANT

P. EMIL IRVING }  
Lieut. Governor }      Witness

DORSE :—I accede to these proposals made by Mr. Le Marchant except the pump for the well, which may not be thought necessary

W. ROY D.Q.M.G<sup>l</sup>.

ALSO ON DORSE :—Mr. Le Marchant's dimensions of his buildings, and conditions with respect to the hiring of them by Government for temporary barracks

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Class 47, Vol. 2565, page 817. (Ordnance. Extracts of Minutes Series II)

From 25th May to 31st December 1798

At Westminster 18th July 1798

Mr. Henry Simmonds having transmitted his Bill for three months hire of Barton Barn for use of the Park of Artillery at Canterbury, and requested that his last Bill amounting to £84 might be paid.

Ordered to be referred to the Surveyor General for allowance according to Agreement and that John Simmonds be acquainted when the last Bill be sent and which he describes will be paid.

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Class 47, Vol. 2580, page 2313. (Ordnance. Extracts of Minutes Series II)

(Ordnance Minute)

At Westminster, 20th August 1804

Rt. Smith Esquire Assistant to the Solicitor having by letter of the 18th inst., stated that he had perused General Morse's letter of the 15th Inst., accompanying Brigadier General Eveleigh's letter regarding the Lands at Stamshaw Point near Tipner, and Little Horsea Island near Porchester, that belong's to Captain Farhill and to the trust Estate of the late Mr. Ridge and as the Price demanded by Captain Farhill was very extravagant and there was some legal obstacles to the purchase of Mr. Ridge's Estate he conceived it would be expedient to take Possession of these Lands under the Authority of the defence Act.

Ordered that Mr. Smith be directed to take possession of this Land under the Authority of the defence Act ; and that Brigadier General Eveleigh be acquainted.

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Class 44. Bundle 679. Ordnance. In-letters

Minute

(In pencil)

'All has been done that is possible on ye Part of the Mast. Genl. the business is fully before the Board.

Dear Sir,

4th August 1805.

The great demand which will soon be made for Gunpowder to replace what has been expended in the late Actions make

me very anxious for the Ordnance to avail themselves of the Chesshunt Water they have purchased. I therefore beg you will let me know the instant your Solicitor enables the Ordnance to lead the Water in question down to the Royal Powder Mills. I found very short water when I was at Waltham Abbey on Friday last. I am very sorry I had not the pleasure of meeting you thereat. The People at the Mills having told me you was there the day before.

I am, dear Sir,  
Faithfully yours,  
W. CONGREVE

P.S.—The Ordnance has a  
very small stock of  
New Gun Powder in  
Store at Purfleet W.C. Comptroller.

Colonel Hadden,  
&ca. &ca. &ca.

Powdr.

Minute  
(In pencil) Refer to Mr. S.  
Report

Charlton 17 Aug. 1805  
Recd. 17th.

Rt. Hoñble.  
and Hoble. Gentn.

At this Crisis, I beg to suggest if it might not be advisable to apply to His Majesty's Ministers to impower the Ordnance to take possession of the Chesshunt Water for as long a time as the Service may require it, allowing a reasonable compensation to the Proprietors of the Corn Mills at that place and Waltham Abbey.

I have the honor to be  
Rt. Hoñble.

&

Hoñble. Gentn.

Your most obedient Servt.

W. CONGREVE

The Rt. Hoñble. Comptroller.  
& Hoñble. The Board of Ordnance.

4th September 1805

Ordered that a Letter be written to L' Colonel Neville, desiring that he will acquaint the Master General that in consequence of the urgent Representations from Major General

Congreve Comptroller of the Royal Laboratory of the necessity of obtaining Possession of the Mills at Chestunt for the Purpose of increasing the Supply of Gunpowder for His Majestys Service, the Board have had a Conference with Mr. Smith, Assistant to the Solicitor, upon the Subject, and finding from Mr. Smith that it is extremely difficult to settle the Interests of all the parties concerned in the Cheshunt Mill Property and that the most advisable Measure will be to have recourse to the Defence Act to obtain possession of the Property. And the Board concurring in Opinion with Major General Congreve that the Exigency of the Public Service renders it indispensable to secure an ample Supply of Water to increase the Stock of Gunpowder, beg leave to recommend to the Master General to authorise the Mills at Chestunt to be taken Possession of under the Defence Act [*remainder in pencil*] which will be attended also with the further Advantage of removing some legal obstacles arising from a Claim of the poor of the Neighbourhood to have their Corn ground at the Mill.

Letter wrote to Col. Neville.

[Minute in ink]

Powder

Reed. 3 May

Right Honourable and Honourable Gentleman.

The business of the Cheshunt Mill came on yesterday before a jury under the Defence Act when after an examination of witnesses on both sides the jury assessed the value of the Lessee's interest at seven thousand five hundred pounds.

This sum carrying interest from yesterday until payment of the money, I shall lose no time in preparing the necessary assignment of the Lease from Messrs Bridgman and Rust and their Mortgagee, Mr. Corrie.

I have the honour to be

With the greatest respect,

Right Honble, and Honble Gentln.

Your most obedient humble servant,

ROBT. SMITH,

Assist. to the Solr.

Basinghall St.

3<sup>d</sup> May 1808

Class 47 (Board), Vol. 269

(Ordnance Minutes)

In Pall Mall—Monday 20th January 1812

Present

Lieutenant General

Surveyor General

Clerk of the Ordnance

\* \* \* \* \*

Mrs. Elizabeth Bayly having by letter dated 18th instant in reply to the Board's reference of the 8th with respect to the land for the Battery at Weymouth and the road leading to it from the Barracks observed that she would [be] willing to grant a lease for the same for twenty one years provided all the buildings and fences which might be erected were at the expiration of the lease left standing

Ordered that Mrs. Bayly be acqu<sup>d</sup> the Board cannot accede to the condition that the fences should remain at the expiration of the lease ; but the Board are willing to execute a lease for twenty one years renewable on a fine certain to be agreed upon And that if Mrs. Bayly declines to grant a lease the Board will be under the necessity of taking possession of the land under the Defence Act.

\* \* \* \* \*

Class 44, Vol. 516

(Ordnance Minutes)

Engr.

Isle of Thanet  
Ramsgate,  
June 20th 1813  
Recd. 21

Sir,

In obedience to the Boards orders of the 8th inst. I have to report upon the claims of Mr. Cowel of Margate, Mr. Tomlin of Northdown and Mr. Bristow of this Island.

About eight years ago when a landing was apprehended on this Coast it was propos'd among the means of defence to stop up the Gateways by which the farmers draw up the Seaweed from the Beach as a manure for their lands, these openings being the only ones for several miles, by which an Enemy could penetrate.

Mr. Pitt assembled the Proprietors at the Townhall of Margate, and proposed the measure, when it was settled, that as the total Stoppage of the Gates would occasion serious loss and inconvenience to the Farmers, a few should be left open at certain intervals to procure the Weed, and the others be fill'd up. This was accordingly done, I believe under the direction of the Royal Staff Corps, and the openings continued shut till the alarm subsided. It appears that some of the Gates were then open'd without application to Government and some with their permission ; but I could not obtain any satisfactory account of this part of the transaction.

It is however perfectly clear to me that the measure was undertaken by order of the Government to the loss and inconvenience of the owners of ground in the neighbourhood ; and as the necessity for keeping them shut no longer exists, it is but just that they should be reopen'd at the expense of the Public, and a fair compensation allowed for the time they have been deprived of their use. The Sketch I now send will shew the Position of these Gates, and the reference list, the Names of the Proprietors, with the expense of opening, compensation &c.

The reopening of Mr. Cowel's Gate No. 1 has been estimated by a man at Margate at £75, but as I think it can be done for much less than this sum, I would propose to send a party under an Officer for this purpose. The loss has been much more considerable to this Proprietor than to the others from the great distance he has been obliged to go for the Weed, and I have therefore put down £10 a year as a moderate sum by way of compensation.

Should the Board determine that the Ordnance discharge this account, the Proprietors will have to receive as follows ; Viz.

Mr. Cowel . . .	80£ and his gate to be reopen'd at the expense of Government
Mr. Tomlin . . .	55£
Mr. Bristow . . .	15£ 15sh

But it is proper to state that the Service was preformed under the direction of another Department, (I presume the Q.M. generals) and therefore it may perhaps be thought right to refer the account for settlement to that Quarter. With this view I collected all the information that two days of examination afforded me, so as to give as little trouble as possible to those

who have to make the compensation, in case they may think proper to act upon my opinion.

I have the honor to be  
Sir,  
Your very obedt. Servt.  
HRY. L. FORD.  
Lt. Colonel R. Eng.

R. W. Crew Esq.,  
&c., &c., &c.

[In pencil] Collect the applications. Refer to Q.M.G.'s Department, stating our opinion that the expence belongs to them, & asking their resolution on Col. F's Statements

[Endorsed] 25 June 1813. Ordered that a Reference be made to the Quarter Master General's Department and that the Boards Opinion be stated that the Expence belongs to them and that the Quarter Master General be requested to signify his resolution on Lt. Col. Ford's statement

R. W.

Letter wrote to Co. Gordon

[Plan]

LIST OF REFERENCE to accompany the Sketch of the  
GATEWAYS on the North side of the Isle of Thanet.  
June 19th 1813

*(Here follow particulars of the several claims and of the compensation awarded in each case)*

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EARL OF CHATHAM'S PAPERS (deposited at the Public  
Record Office)  
Bundle 243

Endorsed September 1819 }

Mr. H. Jeffery }

' Mr. Hunt Jeffery has a farm between Sandgate and Hythe nearer to Sandgate, some of the lands adjoin the high road near the sea. The Duke of Richmond, as Master-General of the Ordnance, has applied to Mr. Jeffery to purchase the land near the sea and at the cliff adjoining, for the use of Government, and to erect batteries and to form a camp there, the land he wants of Mr. Jeffery is about one hundred and forty acres, besides the same quantity from adjoining proprietors, who refuse to give it up. Mr. Jeffery is willing to grant a lease of the land for the

benefit of the country during the war, which has been mentioned to his grace, but that his grace declines, as it will be wanted in a future war, and alleges that then it will be an additional expense to Government to renew the works, and therefore expresses himself determined for the benefit of the country, as he alleges, to purchase the land in question, and in case Mr. Jeffery, persisting in the refusal to sell, to bring in a bill in Parliament to empower the Board of Ordnance to purchase the land in question and to have the value ascertained by a jury, as is usual, Mr. Jeffery hopes that it may be sufficient to have the land in question during the war, as probably in future wars it may not be necessary, and submits that if he give the present accommodation it is all that may be wanted. He is ready to give any temporary accommodation, and the fear of being materially injured by the sale of his estate has made him desist from any contribution in support of any volunteer companies, or by personal service, which he is otherwise induced liberally to support.'

## APPENDIX G

### EXTRACTS FROM ROTULI PARLIAMENTORUM

Rot. Parl., 46 Ed. III (1372)

Vol. II, p. 311, No. vi

ITEM prie la Commune, qe come les Marchantz & Mariners d'Engleterre q̃ xx aunz passez & toutdiz a devant la Navie de dit Roialme estoit en touz Portz & bones Villes sur Mier & sur Ryvers si noble & si pleintinouse, q̃ touz les pays tenoient & appelloient ñre avan dit S̃r le Roi de la Mier, & lui & tout son pays dotoient le plus par mier & p terre par cause de la dite Navie : Et ore il est ensi desencresceez & anientyz par diverses causes, q̃ a poy yl i a demure suffisientis a defendre la dite pays, si grant mestier estoit, encontre Roial Poiar y fuisse a grant perille cōement de tout la Roialme, lesqueux causes serroit trop longe des touz escrire. Mes une cause est principal, la longe Arrest q̃ sovent ad este fait sur les Niefs en temps de Guerre ; c'est assavoir, par un quarter d'an ou plus avant q'ils passent hors de lour Portz sanz rien prendre pur les gages de lour Mariners durant cell temps, ou les S̃rs des Niefs rien prendre de



guerdon pur les Apparaillementz de lour ditz Niefs & Custages. Dount ils priont, en eovre de charite, covenable remedie.

Y plect au Roi q̄ la Navie soit meintenue & gardee, a greindre ease & profit q̄ faire se poet.

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Rot. Parl., 47 Ed. III (1373)

Vol. II, p. 319, No. xvi

ITEM monstront les Seign̄rs de Niefs par tut Engleterre, qe come ils ont sovent foith' avant ses heures sywes en Parlement par Petition de lour anienticementz de lour avoir & destruction de la Navie, en la Manere q'ensust ; C'est assaver, q̄ come lour Niefs sont arestuz par divers temps a servir n̄re Sr le Roi, & demuront sur cel arest, ascun par demy an, & les autres par un quarter de l'an, ou plus, avent q'ils passeront en lour Viages ; issint qe durant cel temps les Seign̄rs de Niefs, ne Mariners d'ycels, rienz ne preignent des gages ne lowers, en grant anienticement & empoverisement de lour estates par cause q̄ remedie sur ceo n'est ordeigne. Pur qi ils priont a nostre S̄r le Roi & a son Conseil, en eovere de charite, ordeiner & graunter en cest present Parlement, qe les Seign̄rs des Niefs puissent estre paieiz de lour gages del comencement de lour arest des Niefs tan q̄ a fin de lour Viage, en reconfort des Seign̄rs de Niefs, & encrees & amendement de tut la Navie.

Areste de Niefs ne serra fait mes quant il busoigne, paiement lour serra fait come ad este use resonablement.

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Rot. Parl., 2 Ric. II (1379)

Vol. III, p. 66, No. xxiv

ITEM prie la Cœ, pur ce q̄ en temps passe la Terre d'Engleterre estoit t̄n repleine de Navie, auxi t̄n des Niefs grosses come des petites, par quel Navie la dœ Terre estoit a celle heure grandement enrichez, & des toutes Terres environ grandement redoutez. Et puis la comencement de la Geurre les ditz Niefs ont este si sovent arestuz pur diverses Viages sur la Meer, p̄ ont les possesseurs du dit Navie ont suffertz si grant damage & perde, si t̄n des Niefs & Batelx come des autres attillementz a ce appartenantz, sanz avoir aucun regard du Roi ou de Roialme : Et auxint leurs Mariners les unes armez, & les autres archiers, ne preignent q̄ IIII d. le jour ; quelle prise leur semble si petite q̄ grande partie des Mariners sont retretz des ditz offices, issint par une voie & par autre les possesseurs des Niefs, & la Navie est t̄n pres gaste & destruit. Sur quoy pleise ordeiner, par advys du Conseil, q̄ les possesseurs des Niefs aient regard pur

lour Niefs & les Marineres lours gages oweles as<sup>l</sup> autres archiers, comenceant les dës gages a lour monstre : quelles amendement ferront si grant esloit en temps a venir, q'il tournera a grant profit du Roi & du Roialme.

Soit usez come devant ent ad este usez.

Rot. Parl., 9 Ric. II (1385)

Vol. III, p. 212, No. 28

ITEM priont les Coës en cest present Parlement come autre foitz fuist ordeigne, q̄ les Niefs armez sur la Mere pur la sauvegarde des Marchantz, & en defense du Roialme, duissent prendre pur chescun tun-tyght trois soldz quatre deniers en la quarter, pur l'apparaille del Nief : Vous plesse ordeigner, q̄ la dite Ordonnance soit tenuz defore en avant pur salvation & sustenance des Niefs avant ditz, pur l'apparaill & ornement de les ditz Niefs lesquels demandent grantz costages ; Considerantz q̄ autrement la Navie ne poet autrement en nulle manere endurere.

Eient pur l'apparaill' & ornement des Niefs per Chescun tun-tyght II s̄ en le quarter, tan q'al prochain Parlement.

Rot. Parl., 4 Hen. IV (1402)

Vol. III, p. 501, No. 56

A TRES excellent, tres redoubte, & tres gracious Sr nre Sr le Roi suppliount voz poverez Communes, q̄ l'Estatut fait l'an primer du regne luy noble Roi E. v̄re aiel, contenant, Qe null soient destreintz d'aler hors de lour Countees sinoun p cause de necessite de sodeigne Venu des estraunges Enemys en Roialme : & l'Estatut fait l'an xviii de regne du dit aiel, Qe Gentz des Armes, Hobelers, & Archiers, esluz pur aler en le service le Roy hors d'Engleterre, soient as Gages le Roi de jours q'ils deptirent hors des Countes ou ils feurent esluz ; & ensement l'Estatut fait l'an xxv du regnele dit aiel, Qe nul soit arte de trover Gentz d'Armes, Hobellers, ne Archers, autres q̄ ceuz q̄ tiegnent p tieux services s'il ne soit p commune assent & graunt fait en Parlement ; soient firment tenuz & gardez en toutz pointz, saunz estre enfreintz en ascun manere. Et q̄ null de voz ditz Communes soit destreint d'aler en Gales, ou aillours hors du Roialme coudre la fourme de les Estatutz avaunt ditz. Et q̄ toutz les Commissions & Briefs faitz a contraire des ditz Estatutz, & toutz les enditementz & acusementz, obligations, & liens faitz par colour des ditz Commissions ou Briefs, ove toutz les dependences & cir-

eumstances d'icell, soient revokez, cancellez, cassez, & adnullez pur toutz jours, come choses faits encountre la Ley, & q̄ ne soient trehez en ensample en temps a venir. Et si aucunes de voz lieges soient emprisonnez p force des ditz enditementz ou acusementz, q'ils soient maintenant deliverez, & les ditz Enditementz tenuz pur nulles.

Le Roy le voet ; p ainsi toutes voies, q̄ par force ou colour de la dite supplication, ne d'ascun Estatut sur ceo a faire, les Seigñrs, n'autres q̄i ount Terres & Possessions en Pays de Gales, ou en la Marche d'icelle, ne soient en ascun manere excusez de lour Servicez & Devoirs de lour ditz Terres & Possessions duez, ne d'ascuns autres Devoirs ou choses auxquelles ils, ou ascuns de eux, sont a ñre dit S̄r le Roy especialment obligez ; combñ q̄ yceux Seigñrs & autres aient autres Terres & Possessions deintz le Roialme d'Engleterre ; ne q̄ les Seigñrs ou autres, de quele estate ou condition q'ils soient, q̄ tieignent p Escuage ou autres Services duez au Roi ascuns Terres ou Possessions dedeinz le dite Roialme, ne soient aucunement excusez de faire les Services & Devoirs des ditz Terres ou Possessions duez, ne q̄ les Seigñrs, Chivalers, Esquiers, n'autres persones, de quele estate ou condition q'ils soient, q̄ tieignent & ount de le Graunt ou Confirmation de ñre dit S̄r le Roi Terres, Possessions, Fees, Annuitees, Enpensions, ou autres Profitz annuelx, ne soient, n'ascun de eux soit, excusez de lour service a faire a ñre dit S̄r le Roy, p tiel manere come ils sount tenuz par cause des Terres, Possessions, Fees, Annuitees, Enpensions, ou Profitz suis ditz.

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Rot. Parl., 3 Hen. V (1415)

Vol. IV, p. 79, No. viii

ITEM suppliont tres humblement voz poveres Communes, Qe come en le temps des tres nobles Progenitours ñre S̄r le Roy accustume & ordeine estoit, q̄ a quell temps q̄ les Niefs du Roialme fesoient a eux service en lour guerres ou autrement, les Possessours de mesmes Niefs, aueroient lour tonnage de lour ditz Niefs, outre les gages des Mariners de mesmes Niefs ; c'est assavoir, a chescun tonneau de quell portage q̄ la Nief furent 111 s. 1111 d., pur le quarter d'an, durant le temps q'ils firent service au Roy, en ascune manere come desuis est dit, le quell tonnage ad estee duement & loialment paie, de temps dount memoire ne court tanq̄ a temps de v̄re Pier, q̄ Dieu assoile ; puis quell temps tanq̄ en cea, le dit tonnage ad este detreei &

abatu des Possessours du Naveye de v̄re Roialme, a lour tres graunt anientisment : p̄ quell encheason ascunes des Possessours du dit Naveie sount outrement anientisez, & la greindre partie du dit Naveye destrutz, & lessez desolate, a tres grand damage de Vous, tres souveraine Sr, & anientisment de v̄re Roialme. pur taunt q̄ la dit Naveye est la greindre substance du t̄n, profit, & prosperitee du v̄re dit Roialme. Pleise a v̄re tres hautisme magnifence Roialme, considerent les premisses, si t̄n pur le bien & proufit de Vous, tres souveraine S̄r, & de v̄re dit Roialme, come pur l'encrees & renovellure du dit Naveye, ordeiner, enaeter, & establir en ycest present Parlement, q̄ des ore en avaunt les Possessours du dit Naveye cient & preignent lour tonnage, pur lour ditz Niefs & Vesselxs, durant le temps q'ils ferrount service a Vous, tres souverain S̄r le Roy, & a voz heirs, en voz guerres ou autrement, come il ad este accustume devaunt ces heures, saunz ent estre forbarrez ou precludez.

Le Roy vorry faire ceo q̄ droit & reson demandent ceste partie.

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Rot. Parl., 20 Hen. VI (1442)

Vol. V, p. 59, No. xiii

PRAYEN the Communes, that hit please the Kyng our Soverain Lord, for the sauff kepyng of the See, to ordeyn and auctorise by the auctorite of this Parlement, certain Articles and appoyntmentes, contained in a Cedula to this Bill annexed.

TENOR vero Cedula predicta sequitur in hec verba.

For as muche as it is thought be alle the Communes of this Lande, that it is necessarie the See to be kepte, there moste purviaunce be made for certeine Shippes defensablez in maner and fourme after olowyng.

FIRST, it is thought, that the lest purveaunce that can be made for the worship of the Kyng our Soverain Lord and welfare and defence of this Roialme of England, is for to have upon the See continually, for the sesons of the yere fro Candilmes to Martymesse, viiic Shippes with forstages ; ye whiche Shippes, as it is thought, most have on with an other, eche of hem CL men ; summa, xii men.

ITEM, every grete Shippe most have attendyng opon hym a Barge, and a Balynger ; and every Barge most have in <sup>xx</sup>iiii men summa, <sup>c</sup>vi and XL men.

ITEM, the viii Balyngers most have in eche of hem XL men ; summa, CCCXX men.

ITEM, there most be awaytyng and attendaunt opon hem IIII Spynes, in eche Spynes XXV men ; summa, C men. Summa of the men, MM CCLX men. Every man takyng 11 s̄ be the month, amounteth in the month CCXXVI li.

ITEM, XXIIII Maisters, eche of hem overe this in the Month XL d ; summa IIII li.

ITEM, over their reward for the quarter Maisters be the month IIII li. ; summa of the Wages, CCCXXXIIII li.

ITEM, Vetaillyng for a month, drawith atte XIII d. the man in the weke, summa <sup>c</sup>v̄ XXVII li. vi s̄ VIII d. ; summa for the month, in Vitaillyng and Wages, vii <sup>c</sup>LXI li. VI s. VIII d. ; summa for VI moneths for this yere. IIII <sup>M</sup><sup>c</sup>D LXVIII li. ; summa for VIII monethes yerely folowyng duryng the graunte of Tonage and Poundage, VI <sup>M</sup><sup>XX</sup> IIII X li. XIII s̄. IIII d̄.

ITEM, it is to be remembred where the saide Shippes shulle be hadde ; First, at Bristowe, the Nicholas of the Toure and Katherine of Burtons. Item, atte Dertemouthe, the Spaynyshe ship that was the Lord Pouns. Item, atte Dertemouth, Sir Phelip Courteney's grete Ship. Item, in the Porte of London II grete Shippes, one called Trinite, and that other called Thomas. Item, atte Hull, a grete Ship called Taverners, ye name Grace Dieu. Item, atte the New Castell, a grete Shippe called the George. Item, VIII Barges to be had ; first, of Herry Ruffell of Weymouth, a Barge. Item, of Phelip Courteney Knyght, 1 Barge. Item, at Plymouth, the Barge called Mangeleke in the water of Saltasshe. Item, atte Wynchelse, II Barges, one of Morefores called the Marie, and that other pratte Barge called Trinite. Item, of London, a Barge of Beaufitz and Bertyns called Valentyne. Item, of Saltasshe, a Barge called Slugge Barge. Item, of Falmouth, a Barge. Item, VIII Balingers First, atte Newcastle, with the grete Ship there, 1 Balinger. Item, of Sir Phelip Courteney's, 1 Balynger. Item, atte Fowy, of Sir William Bonviles, a Balynger called Palmer. Item, atte Dovyr, a Ballynger called Pigfygge, of Wardes and Cooks. Item, atte Sandewych, a Balynger of Haywardes. Item, atte Hampton a Balynger of Clyfdons called Jaket. Item, atte Seynt Ofes, in Essex, a Balynger. Item, of London p Chirch, a Balynger. Item, atte Falmouth, a Balynger. Item, there most be hadde IIII Spynes ; First, one of Henry Russell. Item, atte Hastyng a Spynes. Item, atte Dertmouth, II Spynes.

Item, it is thought that there shulde be chosen and nempned, viii of Knyghtes and worthy Swyers of the West, of the South, and of the North, so that no Cuntre shulde be dispesid ; and yerof the Kyng oure Sovereaigne Lord chiefe suche on as hym liketh to be a chief Capytayne, and other VII as the Kyng liketh of the saide VIII, for to attende the saide chief Capytayne ; so that every grete Shippe have a Capytayne withynne borde.

ITEM, it is to be remembre, that the Kyng will gyff hem in charge, be his Officers to hem sent, yt all these saide Shippes stuffed and arrayed make their first assemble in the Caumbre, there to obey suche rewle and governaunce, as be their Capitayne and undre Capitayns shall to hem be ordeyned, and there moustre of every Shippe to be sene by suche persones as the Kyng will depute therto be his Commission.

ITEM, there suche Proclamation and Ordenaunce to be made and established amongs and in the saide Navie, that none Shipp or Shippes, harme ne hurt none other Shippe of oure Freendes ; where thorough any trouble or brekyng of pees myght falle betwene the Kyng our Sovereaigne Lord, and other of his Freendes.

ITEM, it is thought necessarie, that if any Shippe or Shippes be taken as Ennemyes, whenne the goodes in the saide Shippes be brought into any Port of this Land ; that the godes ne the Shippes be nat disperbled ne devided, into the tyme that it be duly knowen, wheder it be Enemyes goodes, or Freendes goodes : Forfene alwey that ye presse be made withinne VI wekes after the landyng or havenyng of the seide Shippe or Shippes and Goodes so taken.

ITEM, it is to be remembred, how in tyme passid awners of divers Shippes, that have, be commaundement of the Kynges Counseill, sent their Shippes to the See, and they nought sette in their Shippes Maisters ne Maryners, for their mesprision on the See were putte in grete trouble and disease. Wherefore be it now ordeyned by autorite of this Parlement, that noone suche awner of any Shippe at this tyme goyng to the See, or here after shall goe to the See; for kepyng therof, be endaungered or disseised, lesse thenne he be in the See with his Shippe in his persone, or ellis be partyner of such goodes mistaken ; and if he so be founden, yan' he to answeere to the partie that the goodes be mystake of, to the value thereof that comes to his hands, and in that caas he to be beleved be his othe, and II or III of his credible neyghbours with hym sworne, and so to be acquitte. Forthermore it is avised, yat if it so be that any of the saide

Shippes in this Ordenaunce appoynted be nat in England, ne in the Portes afore named, or mowe not be had, yt yanne it shall be lefull to the said chief Capytayne, for to chefe be his wisdom, an other Shipp or Shippes like to hem that lakketh of thoo that afore ar named ; and that every under Capitaune, in the absence of the chief Capitaune, have power in the same fourme, and in caas like, for suche Shippes as shall be necessarie.

ITEM, it is thought, that the Goodes and Shippes that mowe happe to be taken by hem, or by any of hem, in the See of our Enemys, shall be departed in the fourme aftre sewyng. That is to say, the Maisters of the Shippes, Quarter Maisters, Shipmen and Soudecours, shul have half the Shippes and Goodes so taken and overe half of the Shippes and Goodes, shall be departed in three, of the whiche the awners of the Shippes, Barges Balingers and Spinaces, shall have II partes, and the chief Capitain and the under Capitayns the third parte ; of the whiche thrid parte, the chief Capitaune shall have double that oon of the under Capitayns shall have.

ITEM, that the IIII the parte of the half XV me now graunted, after the fourme of excepcion and deduction in the same Graunt, and after the rate therof according the deduction of suche perte of a XV me by Knyghts of the Shire last made and after the afferaunt of the exceptions in this Graunt, be arrerid by the Collectours therto to be nevend, and by hem payed into the Kings receipt, at the moys of Estre next comyng ; and that somme to be delivered by the Tresourer of England, to the Chief Capitayn and undre Capitayns by the Kyng to be nevend by Endenture bitwene the Kyng and the seid Capitayns yerof to be named, for the seid Governauce and keping of the See, and to noon overe use ; whiche kepyng shal begynne the XVth day of May next comyng and endure to the XVth day of November yan next sewing. And yan, at ye first day of March next aftre the said XVth day of November the keping of the See begin in manere and fourme as is abovesaid, to endure for the term of VIII monethes yan next folwyng ; the paiement therof to be made of the Tonage and Pown dage in this Parlement graunted, by the Tresorer of England for the tyme beyng, to such Capytayne and Capitaynes as by the Kyng shall be nevend, after the rate of the seid VI monethes, by Endenture bitwene the Kyng and the seid Capitayns to be made ; and so forth ye next yere folowyng in slembable wise alwey forsayn, that yf ye seid Capitains or any of theym or any of their meyn undre them, absent himself out of the See any of the monethes or part of hem

aforesaid, that yanne he or they be disallowed so moch of their Wages as the rate comes to for the tyme of her absenc' ; lesse yan the seid Capitain or Capitains or ony man under yeym so absent leve a suffisaunt man, or so many suffisant men in there stede, for the tyme of their absence.

ITEM, that noon of the seid Vesselles, nor noon oyere Vessel to be had in stede of any of hem attending to the same Viage, be arrested for any Viage of oure Sovereign Lord ye Kyng, appoynted or to be appoynted, nor in no oyere use, during the yeres aforeseid.

Soit fait come il est desire, durant le temps de la sauf garde de le Meer deins especifie.



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